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Supreme Court of the United States

OCTOBER TERM, 1953

No. 13

POPE & TALBOT, INC., PETITIONER,

vs.

CHARLES HAWN AND HAENN SHIP CEILING AND REFITTING CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 6, 1953

CERTIORARI GRANTED JUNE 15, 1953

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 10,630.

CHARLES HAWN

v.

POPE & TALBOT, INC.,

Appellant,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION.

Appeal from the Judgment of the United States District Court for the Eastern District of Pennsylvania.

Appendix for Appellant.

THOMAS E. BYRNE, JR.,
MARK D. ALSPACH,
KRUSEN, EVANS AND SHAW,
225 S. 15th Street,
Philadelphia, Penna.,
Attorneys for Appellant.

International, 236 Chestnut St., Phila. 6, Pa.

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RELEVANT DOCKET ENTRIES.

Dec. 3, 1948.	Record received from E. D. of N. Y. and filed—viz: Complaint with demand for jury trial. Summons with Marshal's return. Affidavit of Frederick Travers. Certified copy of Order for transfer.
Dec. 14, 1948.	Appearance of Krusen, Evans & Shaw, Esqs., for defendant, filed.
Dec. 14, 1948.	Answer filed.
Dec. 14, 1948.	Defendant's interrogatory to plaintiff, filed.
Dec. 15, 1948.	Plaintiff's interrogatories to defendant, filed.
Dec. 17, 1948.	Order to place case on trial list filed.
Dec. 20, 1948.	Motion by plaintiff to inspect, photograph, etc. and Order of Court granting same, filed. 12-21-48 Noted & Notice mailed.
Jan. 27, 1949.	Plaintiff's answers to interrogatories filed.
Feb. 21, 1949.	Defendant's answers to interrogatories, filed.
Oct. 7, 1949.	Notice of motion for leave to join Third-party defendants filed.
Oct. 11, 1949.	Motion by defendant to bring in Third-party defendants and Order of Court granting motion filed. 10/12/49 Noted.
Oct. 11, 1949.	Third-party Complaint against Haenn Ship Ceiling & Refitting Corp. filed.
Oct. 11, 1949.	Third-party Summons exit.

Oct. 11, 1949.	Third-party Complaint against Atlantic & Gulf Stevedores Inc. filed.
Oct. 11, 1949.	Third-party Summons exit.
Oct. 27, 1949.	Appearance of Rawle & Henderson Esqs. for Haenn Ship Ceiling & Refitting Corp. filed.
Oct. 31, 1949.	Appearance of Howard R. Detweiler, Esq. for Atlantic & Gulf Stevedores Inc., filed.
Oct. 31, 1949.	Answer of Atlantic & Gulf Stevedores Inc. filed.
Nov. 1, 1949.	Motion for leave to amend complaint and Order of Court granting leave filed. 11/2/49 Noted & Notice mailed.
Nov. 1, 1949.	Amended Complaint by plaintiff against Atlantic & Gulf Stevedores Inc. filed.
Nov. 1, 1949.	Summons exit.
Nov. 2, 1949.	Third party summons as to Haenn Ship Ceiling & Refitting Corp. returned "on Oct. 17, 1949 served" and filed.
Nov. 2, 1949.	Third party summons as to Atlantic & Gulf Stevedores, Inc. returned "on Oct. 12, 1949 served" and filed.
Nov. 12, 1949.	Answer of Haenn Ship Ceiling & Refitting Corp. to Third-party Complaint filed.
Nov. 14, 1949.	Amended Answer of Haenn Ship Ceiling & Refitting Corp. to Third-party Complaint, filed.
Nov. 15, 1949.	Answer of Atlantic & Gulf Stevedores to Amended Complaint filed.
Nov. 23, 1949.	Plaintiff's Interrogatories to Atlantic & Gulf Stevedores Inc. filed.

Nov. 28, 1949.	Summons on amended Complaint returned "on November 3, 1949 served" and filed.
Dec. 2, 1949.	Answer of Pope & Talbot, Inc. to amended complaint, filed.
Jan. 6, 1950.	Answer of Third-party defendant Atlantic & Gulf Stevedores Inc. to plaintiff's interrogatories filed.
Jan. 9, 1950.	Motion to compel further answers by Atlantic & Gulf Stevedores Inc. to plaintiffs interrogatories, filed.
Jan. 9, 1950.	Order to place case on argument list filed.
Jan. 31, 1950.	Defendant's interrogatories to plaintiff filed.
Feb. 1, 1950.	Transcript of pre-trial conferences on 1/26/50 and 1/31/50 filed.
Feb. 2, 1950.	Defendant's notice of taking depositions of R. Horchuck et al filed.
Feb. 3, 1950.	Plaintiff's interrogatories to defendant filed.
Feb. 3, 1950.	Plaintiff's answers to defendants interrogatories filed.
Feb. 3, 1950.	Plaintiff's interrogatories to Haenn Ship Ceiling & Refitting Corp., 3rd party defendant, filed.
Feb. 7, 1950.	Defendant's notice of taking depositions filed.
Feb. 8, 1950.	Plaintiff's notice of taking deposition of Dr. A. Myers, filed.
Feb. 8, 1950.	Answers of Haenn Ship Ceiling & Refitting Corp. to plaintiff's interrogatories filed.

Feb. 9, 1950.	Answers of Pope & Talbot Inc. to plaintiff's interrogatories filed.
Feb. 13, 1950.	Amended Answer of Haenn Ship Ceiling & Refitting Corp. filed.
Feb. 15, 1950.	In open Court: Counsel stipulate that action be dismissed as to Atlantic & Gulf Stevedores Inc.
Feb. 15, 1950.	Jury called and sworn.
Feb. 15, 1950.	Judgment dismissing action as to Atlantic & Gulf Stevedores Inc., filed. 2/16/50 Noted & Notice mailed.
Feb. 16, 1950.	Trial resumed.
Feb. 17, 1950.	Trial resumed.
Feb. 20, 1950.	Trial resumed.
Feb. 21, 1950.	Trial resumed.
Feb. 23, 1950.	Trial resumed.
Feb. 23, 1950.	Verdict: The jury returns a special verdict.
Feb. 23, 1950.	The jury answers certain interrogatories (see minutes).
Mar. 2, 1950.	Motion of Haenn Ship Ceiling & Refitting Corp., 3rd party defendant for judgment notwithstanding the verdict for a new trial or for entering judgment in accordance with special verdict filed.
Mar. 7, 1950.	Motion by defendant and third party plaintiff for judgment N. O. V., for a new trial, and for molding verdict filed.
Mar. 13, 1950.	Motion by plaintiff for entry of judgment in his favor filed.
Mar. 13, 1950.	Order to place case on the Argument List filed.

Mar. 13, 1950.	Motion by Aetna Casualty & Surety Co. for leave to intervene as a party plaintiff filed.
Mar. 22, 1950.	Plaintiff's Requests for Charge, filed.
Mar. 22, 1950.	Defendant's Requests for charge, filed.
Mar. 22, 1950.	Third Party Defendant's Requests for charge, filed.
Mar. 22, 1950.	Deposition of Dr. Abraham Myers, filed.
Mar. 22, 1950.	Testimony of Feb. 15, 16 & 17, 1950, filed. (1 vol.)
Mar. 22, 1950.	Testimony of Feb. 20, 21 & 23, 1950, filed. (1 vol.)
Apr. 12, 1950.	Additional reasons of Pope & Talbot Inc. in support of motion for new trial, filed.
May 25, 1950.	Order of Court directing U. S. Marshal to furnish dinner for jurors and Deputy Marshals, filed.
May 29, 1950.	Hearing sur motions filed Mar. 2, 7, 13, 1950 submitted on briefs.
July 17, 1951.	Opinion, McGranery, J. denying defendant's and Third-Party Defendant's Motions for New Trial and for Judgment N. O. V. etc. filed.
Sept. 28, 1951.	Memorandum Opinion McGranery, J. re entry of Judgment, filed.
Sept. 28, 1951.	Judgment in favor of Plaintiff and against defendant in the sum of $29,700, with interest and costs; and in favor of Third-Party Plaintiff and against Third-Party Defendant in the sum of $8,331.35 with interest and costs, with leave to Third-Party Deft. to move for modification of the judgment, etc. filed. 10/1/51 Noted & Notice Mailed.

Oct. 25, 1951. Notice of Appeal by Defendant and Third party plaintiff, Pope & Talbot, Inc., filed. 10/26/51 Copy to Freedman and Rawle & Henderson.

Oct. 25, 1951. Notice of Appeal by Third party defendant, Haenn Ship Ceiling & Refitting Corp. filed. 10/26/51 Copy to Freedman, Landy & Lorry; Krusen, Evans & Shaw.

Oct. 25, 1951. Copies of Clerk's notice to U. S. Court of Appeals, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

C-9365

CHARLES HAWN,
Plaintiff,

against

POPE & TALBOT, INC.,
Defendant.

Filed Dec. 3, 1948.
GEORGE BRODBECK, Clerk
By G Deputy Clerk

PLAINTIFF DEMANDS A TRIAL BY JURY

COMPLAINT.

Plaintiff, complaining of the defendant by his attorney, FREDERICK TRAVERS, alleges upon information and belief the following:—

1. Plaintiff is a citizen of the United States and a resident of 824 East Brown Street, in the City of Gloucester, State of New Jersey, and within the jurisdiction of this Court.

2. Upon information and belief that at all the times hereinafter mentioned, defendant was and still is a foreign corporation, duly licensed to do business in the State of New York, having an office and principal place of business in the Borough of Manhattan, City and State of New York, and as such, is now or about to come within the jurisdiction of the United States of America and this Honorable Court.

3. Jurisdiction is based on diversity of citizenship and the amount in controversy exceeds, exclusive of interest and costs, the sum of THREE THOUSAND ($3,000.00) DOLLARS.

4. That at all the times hereinafter mentioned, the defendant owned, managed, operated and controlled a certain steamship or vessel known as the S. S. JOHN DICKINSON.

5. That in connection with the business of the said defendant, at all the times hereinafter mentioned, the defendant moored or docked the aforesaid vessel at Pier #3, Girard Point, in the City of Philadelphia, State of Pennsylvania.

6. That at all the times hereinafter mentioned, the plaintiff was employed by Haenn Ship Ceiling and Refitting Corporation, as a marine carpenter, pursuant to an agreement between plaintiff's employer and the said defendant whereby the plaintiff and others were to make repairs to the said vessel which was docked at the said pier aforementioned.

7. That at all the times hereinafter mentioned, the defendant had an agreement with plaintiff's employer as a result of which agreement the plaintiff was employed as a marine carpenter on the said vessel known as the S. S. JOHN DICKINSON.

8. That it was the duty of the defendant to furnish the plaintiff with a safe place to work.

9. That it was the duty of the defendant as the operator of the aforesaid vessel to keep and maintain the aforesaid vessel and its appurtenances in a safe condition so that plaintiff could safely and properly perform his duties.

10. That at all the times hereinafter mentioned, the plaintiff was properly and lawfully upon said vessel in the pursuit of his employment.

11. That heretofore and on or about the 16th day of November, 1947, while the plaintiff, in the pursuit of his employment, was upon said vessel, without any fault or carelessness or negligence on his part, and solely through the fault, carelessness and negligence of the defendant, its agents, servants and/or employees, he was caused to fall into the hold of the #4 hatch aboard said vessel, causing said plaintiff to suffer severe and serious injuries to his person.

12. That the aforesaid occurrence was due solely to the carelessness, recklessness and negligence of the defendant, its agents, servants and/or employees; the fault, omission and neglect of officers and seamen aboard the vessel; the failure, neglect and omission of the defendant to keep and maintain the aforesaid vessel and its appurtenances in a seaworthy condition; in the defendant's failure to take any means or precautions for the proper safety of the plaintiff; in the failure to provide the plaintiff with a safe place to work and/or to perform his duties; in failing to maintain the aforesaid vessel and all of its appurtenances in a reasonably safe condition and repair; in causing, suffering and permitting the hatch covers of #4 hatch of said vessel to be recoved from said hatch without knowledge or notice to said plaintiff; in removing the hatch covers of #4 hatch without properly notifying the plaintiff; in failing to place proper and suitable safeguards indicating to plaintiff and others upon said vessel that the said hatch covers of #4 hatch had been removed; in the improper supervision of the aforesaid vessel; in failing to warn, guard and protect plaintiff against the dangerous and unsafe conditions prevailing on said vessel; in the improper supervision of the removal of the aforesaid hatch covers and its appurtenances; in suffering, causing and permitting the aforesaid hold upon the said vessel to remain open without proper safeguards; insufficient illumination; in failing to cover and protect the aforesaid hold on said

vessel as a result of which the same became dangerous to persons lawfully employed aboard said vessel and about the said hold; in failing to give any signal or warning of the existence of an open or unprotected hold; in employing incompetent officers, agents, servants and/or employees; in failing to properly supervise its officers, crew, agents, servants and/or employees; in permitting, suffering and causing the decks of said vessel to be, become and remain slippery; in permitting, suffering and causing the said decks to contain oil, grease and other foreign matter; in failing to exercise such care and caution in the premises as would have avoided the said occurrence, and the defendant was otherwise careless, reckless and negligent in the premises.

13. That by reason of the foregoing, plaintiff was caused to sustain severe, painful and permanent injuries to his person and became and has remained sick, disabled and incapacitated from attending to his usual duties and vocation, resulting in his suffering a loss of earnings thereby, compelling him to be confined to a hospital, bed and home, and incurring obligations for medical and surgical aid and attendance, and permanently injuring this plaintiff, all to his damage in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars.

Whereby, plaintiff demands judgment against the defendant in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars, together with the costs and disbursements of this action.

/s/ Frederick Travers,
Frederick Travers,
Attorney for Plaintiff,
Office & P. O. Address:
305 Broadway,
New York City, 7.

ORDER FOR TRANSFER TO ANOTHER DISTRICT.

(U. S. D. C., E. D. N. Y., C. No. 9365.)

Defendant, appearing specially for the purpose of said motion, having moved for an order vacating the service of process herein and dismissing the action on the ground that the venue is improper, or in the alternative transferring the cause pursuant to Title 28, United States Code, Sections 1404 and 1391, to the United States District Court for the Eastern District of Pennsylvania, and after hearing counsel for the respective parties, it is

ORDERED that said motion is granted so far as it requests a transfer of this action, and it is further

ORDERED that the above entitled action be transferred from this Court to the United States District Court for the Eastern District of Pennsylvania and that all papers heretofore filed herein together with a certified copy of this order be forwarded to the Clerk of the said United States District Court for the Eastern District of Pennsylvania, and it is further

ORDERED that the defendant may move or answer with respect to the complaint within twenty days after the filing of the said papers in the United States District Court for the Eastern District of Pennsylvania.

/s/ ROBT. A. INCH,
U. S. D. J.

Dated, Brooklyn, N. Y.
November 19th, 1948.

ANSWER.

(U. S. D. C., E. D. Pa., C. A. No. 9130.)

The Answer of Pope & Talbot, Inc., respectfully alleges, upon information and belief, as follows:

The Defendant admits the averments of Paragraphs 3 and 5 of the Complaint. It denies the averments of Paragraphs 11, 12 and 13. It denies that it has knowledge or information sufficient to form a belief as to the averments of Paragraphs 1, 7 and 10, and demands strict proof thereof, if material. It denies the averments of Paragraph 6 as stated. It denies the averments of Paragraph 2 as stated; and it further alleges that the same are immaterial in view of the transfer of this case from the U. S. District Court, for the Eastern District of New York, by Order dated November 19, 1948. Defendant denies the averments of Paragraph 4 as stated; on the contrary it avers that the S. S. "John Dickinson" was operated by the Defendant under bareboat charter from the United States Maritime Commission. Defendant avers that Paragraphs 8 and 9 of the Complaint are statements of legal conclusions and as such require no answer.

Second Defense.

Any injury which the Plaintiff may have sustained, and any disability which may have resulted therefrom were approximately caused by the Plaintiff's own negligence.

Third Defense.

Plaintiff assumed the risks of his employment.

Wherefore, the Defendant prays that the Complaint herein be dismissed, and that it may recover its costs in this proceeding and have such other and further relief as may seem just to this Honorable Court in the premises.

Krusen, Evans and Shaw,

By Mark D. Alspach,

Attorneys for Defendant.

THIRD-PARTY COMPLAINT AGAINST HAENN SHIP CEILING AND REFITTING CORPORATION.

1. The Plaintiff, Charles Hawn, has filed a complaint against the Defendant, Pope & Talbot, Inc. A true and correct copy of the said complaint has been marked Exhibit "A" and is attached hereto and made a part hereof.

2. The Defendant, Pope & Talbot, Inc., has filed its answer, in which it denies liability to the Plaintiff, but at the trial of the cause it may be held liable to the Plaintiff.

3. The Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation, is a corporation formed and existing under the laws of the Commonwealth of Pennsylvania, and has an office and place of business at Schuylkill Avenue and Magazine Lane, Philadelphia, Pennsylvania.

4. If the Plaintiff suffered injury as a result of the matters referred to in the complaint, which the Defendant denies, and if, as will more fully appear at the trial of the cause, the Defendant and Third-Party Plaintiff is liable to the Plaintiff, then the Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation, is liable over to the Third-Party Plaintiff by way of contribution and/or indemnity by reason of the following:

(a) The work in which Plaintiff was engaged at the time of his accident, and the portion of the Steamship "John Dickinson" in which said work was being performed, and in which said accident occurred, was in the exclusive charge and complete control of the Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation, its servants, agents, workmen, and employees.

(b) If the Plaintiff suffered injury as the result of the recklessness, carelessness and negligence, or the act or omission of any person or persons in the particulars alleged in Paragraphs 11 and 12 of the com-

plaint, said carelessness, recklessness, negligence, act or omission was, in whole or in part, that of the Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation, its servants, agents, workmen, and employees.

(c) If the Plaintiff suffered injury as the result of any unseaworthy condition of the vessel or its appliances, in any of the particulars alleged in Paragraphs 11 and 12 of the complaint, said unseaworthy condition was created or contributed to by the Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation, its servants, agents, workmen, and employees.

(d) The Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation, its servants, agents, workmen, and employees, were otherwise careless, negligent, and reckless in the premises, as will more fully appear at the trial of the cause.

WHEREFORE, the Defendant, Pope & Talbot, Inc., prays that it may have judgment over against the Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation, by way of contribution and/or indemnity, in whole or in part, for any sum which may be recovered against it by the Plaintiff in this action.

KRUSEN, EVANS AND SHAW,

By MARK D. ALSPACH,
Attorneys for Pope & Talbot, Inc., Defendant and Third-Party Plaintiff.

AMENDED COMPLAINT.

Plaintiff, Charles Hawn, claims of Pope & Talbot, Inc., defendant, and Atlantic and Gulf Stevedores, third-party defendant, the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars with lawful interest thereon, upon a cause of action whereof the following is a true statement:

1. Plaintiff is a citizen and resident of New Jersey.

2. Defendant, Pope & Talbot, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware.

3. Third party defendant, Atlantic and Gulf Stevedores, Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania.

4. On or about November 16, 1947, and at all times mentioned herein, plaintiff was engaged by the Haenn Ship Ceiling and Refitting Corporation as a ship's carpenter for the performance of certain work aboard the S. S. "John Dickinson" while the said vessel was berthed at Pier 3, Girard Point, Philadelphia.

5. Upon information and belief, plaintiff avers that at all times hereinafter mentioned, defendant owned, managed, operated and controlled the S. S. "John Dickinson", engaged in coastwise, intercoastal and foreign commerce.

6. On or about November 16, 1947, and at all times mentioned herein, Haenn Ship Ceiling and Refitting Corporation was engaged in repairing the shifting boards and feeders on the S. S. "John Dickinson", pursuant to an understanding and agreement entered into between the Haenn Ship Ceiling and Refitting Corporation, and the authorized agents and representatives of the vessel, her owners and operators.

7. On or about November 16, 1947, at or about 3:30 P. M., plaintiff, while engaged in the performance of his duties at the 'tween deck level of the No. 4 hold, was suddenly caused to fall into the lower hold, as a result of which he sustained the injuries which are more specifically hereinafter set forth.

9. Disregarding their duties in the premises, defendants Pope & Talbot, Inc., and Atlantic and Gulf Stevedores, Inc., by their agents, servants and employees, were careless and negligent and the vessel was unseaworthy in:

(a) failing to provide a reasonably safe place for plaintiff to perform his duties;

(b) causing and/or allowing openings at the 'tween deck level;

(c) removing and in failing to replace certain hatch covers at the 'tween deck level, thereby leaving dangerous openings;

(d) failing to inspect and warn plaintiff of the unsafe and dangerous conditions existing at the No. 4 hatch 'tween deck;

(e) failing to provide safety lines, warning lights or other warning and safeguard devices at and around the aforesaid hatch opening;

(f) failing to provide sufficient and adequate illumination at the No. 4 hold 'tween deck;

(g) causing and allowing slippery, oily, greasy and other foreign substances to accumulate on the 'tween deck at No. 4 hold and failing to remove the aforesaid substances;

(h) failing to provide sufficient and adequate illumination at the No. 4 hold 'tween deck under the circumstances;

(i) causing and permitting plaintiff to fall to the hold below;

(j) failing to provide plaintiff with a safe and seaworthy vessel and safe and seaworthy appliances and appurtenances and to keep same in a safe and seaworthy condition;

10. By reason of the negligence of the defendant and/or third-party defendant, Atlantic and Gulf Stevedores, Inc., plaintiff fell as aforesaid and was then and there generally wounded; his head, shoulders, arms, back, pelvis, legs and feet and the muscles, tendons, ligaments and nerves attached thereto were severely wrenched, bruised, fractured and otherwise injured; he sustained serious and permanent internal injuries the full extent of which are yet known; he suffered a severe shock to his nervous system; he has suffered excruciating and agonizing aches, pains, mental anguish, shock and disability; he has been unable to assume his usual duties and occupation for a long period of time in the past and upon information and belief avers that his injuries have become aggravated and permanent, and that he will be unable to perform his usual duties and occupation in the future; he has in the past and will in the future be compelled to expend large sums of money for medical care and treatment.

WHEREFORE, Charles Hawn claims the sum of $250,000.00 from Pope & Talbot, Inc., and Atlantic and Gulf Stevedores, Inc., and brings this action to recover same.

FREEDMAN, LANDY AND LORRY,

By WILLIAM M. ALPER,
Attorneys for Plaintiff.

AMENDED ANSWER OF HAENN SHIP CEILING AND REFITTING CORPORATION TO THIRD-PARTY COMPLAINT.

The amended answer of Haenn Ship Ceiling and Refitting Corporation, a corporation, by its attorneys, to the third-party complaint of Pope & Talbot, Inc., respectfully shows to this Honorable Court upon information and belief as follows:

First Defense.

The answering third-party defendant admits the allegations contained in paragraphs 1, 2 and 3 of the third-party complaint, and denies each and every allegation contained in paragraph 4, sub-paragraphs (b), (c), and (d).

This third-party defendant admits that it had exclusive charge and complete control of the work in which plaintiff was said to be engaged at the time of the accident as alleged in paragraph 4 (a) of the third-party complaint, but denies that it had exclusive charge and complete control of the portion of the vessel in which the said work was being performed. On the contrary, it is averred that the vessel, including such portion, was and continued to be under the general charge and control of the vessel owners, agents, master, officers and crew, subject only to the limited degree of control which was necessary to the work being performed by the shore workmen, and it is accordingly averred that such portion of the vessel and its equipment and appurtenances were under the joint control of the said parties at all material times.

Second Defense.

As a second and separate defense, this third-party defendant denies that the alleged injuries set forth in the original complaint were due in any respect to any fault and negligence on the part of this third-party defendant, but on the contrary avers upon information and belief that

the same were due solely or in major part to the negligence and carelessness of plaintiff in failing to observe where he was walking, and in failing to exercise due care for his own safety under the circumstances, and in failing to perform his duties as hatch foreman in a proper and competent manner.

RAWLE & HENDERSON,

By JOSEPH W. HENDERSON,
Attorneys for Third-Party Defendant, Haenn Ship Ceiling and Refitting Corporation.
1910 Packard Building,
Philadelphia 2, Pennsylvania.

ANSWER OF DEFENDANT, POPE & TALBOT, INC., TO PLAINTIFF'S AMENDED COMPLAINT.

The Answer of the Defendant, Pope & Talbot, Inc., to the Amended Complaint of Charles Hawn respectfully represents, upon information and belief:

1. Defendant lacks information sufficient to form a belief as to the truth or falsity of the averments of the First Paragraph of the Amended Complaint, and accordingly demands strict proof thereof, if material.

2. Denied.

3. Defendant denies that it is required to answer the averments of the Third Paragraph of the Amended Complaint, inasmuch as the same pertain to another Defendant, Atlantic & Gulf Stevedores, Inc.

4. Admitted.

5. Denied. On the contrary, Defendant avers that the Steamship "John Dickinson" was operated by it under the terms of a bareboat charter from the United States Maritime Commission, and not otherwise.

6. Defendant lacks information sufficient to form a belief as to the truth or falsity of the averments of the Sixth Paragraph of the Amended Complaint, and accordingly demands strict proof thereof, if material.

7. Denied as stated. Defendant admits that on or about November 16, 1947, at or about 3:30 P. M., Plaintiff either walked or fell from the 'tween deck level of the No. 4 hold into the lower hold of the Steamship "John Dickinson". The remaining averments of the Seventh Paragraph of the Amended Complaint are denied.

9. Defendant denies the allegations of the Ninth Paragraph of the Amended Complaint, including the sub-paragraphs designated (a) through (j) inclusive, insofar as said allegations pertain to itself. Defendant avers that it

is not, in this pleading, required to answer said allegations insofar as they pertain to the Defendant Atlantic & Gulf Stevedores, Inc.

10. Denied.

Further answering the amended complaint, and as full and/or partial defenses, as the facts may appear, Defendant Pope & Talbot, Inc., respectfully alleges as follows:

11. Any injury which the Plaintiff may have sustained, and any disability which may have resulted therefrom, were caused, in whole or in part, by the Plaintiff's own negligence and failure to exercise due regard for his own safety.

12. Plaintiff assumed the risks of his employment.

13. The portion of the Steamship "John Dickinson" in which Plaintiff was working at all material times was in the exclusive possession and control of third parties or persons for whose acts or omissions this Defendant is not liable.

14. The means and methods employed in and about the work in which Plaintiff was engaged were under the direct supervision and control of third parties or persons for whose acts or omissions this Defendant is not liable.

15. If the aforementioned accident and/or injuries to the Plaintiff were the result, in whole or in part, of the negligent act or omission of any person or party, other than Plaintiff himself, then said negligent act or omission was that of third parties or persons for whose acts this Defendant is not liable.

16. If the aforementioned accident and/or injuries to the Plaintiff were the result, in whole or in part, of any unseaworthiness of the Steamship "John Dickinson", which Defendant hereby denies, then said unseaworthiness was caused and/or created, in whole or in part, by third

parties or persons for whose acts or omissions this Defendant is not liable.

WHEREFORE, Defendant respectfully prays this Honorable Court that this within Amended Complaint may be dismissed, that it may recover its costs, and that it may have such other and further relief as may seem just in the premises.

KRUSEN, EVANS AND SHAW,

By MARK D. ALSPACH,
Attorneys for the Defendant, Pope & Talbot, Inc.

AMENDED ANSWER OF HAENN SHIP CEILING AND REFITTING CORPORATION, THIRD-PARTY DEFENDANT.

THIRD DEFENSE.

1. The plaintiff herein, Charles Hawn, at the time and place mentioned in the Complaint and in the Third-Party Complaint, was an employee of the Third-Party defendant, Haenn Ship Ceiling and Refitting Corporation. His injury occurred during the course of his employment upon navigable waters of the United States and under circumstances where recovery for his disability against the Third-Party defendant is not provided for by state law. The Third-Party defendant accordingly avers that as between itself and the plaintiff the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, were applicable and that Section 5 of said Act provides, in part, that the liability of an employer shall be exclusive and in place of all other liability of such employer to the plaintiff, or any one otherwise entitled to recover damages from the Third-Party defendant, at law or in admiralty on account of such injury.

The Third-Party defendant further avers that it has secured the payment of the compensation provided for in said Act to the plaintiff and that said compensation has been paid according to law. The Third-Party defendant has paid to the plaintiff approximately Two Thousand Nine Hundred Dollars ($2,900) for compensation and has expended the sum of approximately Eight Hundred and Thirty Six Dollars and Fifteen Cents ($836.15).

The Third-Party defendant therefore pleads the provisions of the Longshoremen's and Harbor Workers' Compensation Act as a bar to the within action.

RAWLE & HENDERSON,
By: THOMAS F. MOUNT,
Attorneys for Haenn Ship Ceiling and Refitting Corporation, Third-Party Defendant,
1910 Packard Building,
Philadelphia 2, Pa.

EXCERPTS FROM TESTIMONY.

(1)* IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Charles Hawn,

v.

Pope & Talbot, Inc.,

v.

Haenn Ship Ceiling & Refitting Corporation,

and

Atlantic & Gulf Stevedores, Inc.

Civil Action, No. 9130.

Philadelphia, Pa., February 15, 1950

Before Honorable JAMES P. MCGRANERY, *J.*, and a Jury.

Present: FREEDMAN, LANDY AND LORRY, ESQS., by SAMUEL H. LANDY, ESQ., and CHARLES LAKATOS, ESQ., representing Charles Hawn;
KRUSEN, EVANS AND SHAW, ESQS., by THOMAS E. BYRNE, JR., ESQ., and MARK D. ALSPACH, ESQ., representing Pope & Talbot, Inc.;
(2) RAWLE & HENDERSON, ESQS., by THOMAS F. MOUNT, ESQ., representing Haenn Ship Ceiling & Refitting Corporation;
HOWARD R. DETWEILER, ESQ., representing Atlantic & Gulf Stevedores, Inc.

* Figures in parentheses refer to typewritten pages of proceedings.

FIRST DAY.

• • •

(11) THE COURT: • • •

Then, for the purposes of the record, it is stipulated and agreed between all the parties that the action brought in the matter of Charles Hawn against Pope & Talbot, Incorporated, Haenn Ship Ceiling & Refitting Corporation, and Atlantic & Gulf Stevedores, Incorporated, in so far as the Atlantic & Gulf Stevedores, Incorporated, is concerned, is by this stipulation dismissed and not to be submitted in any wise to the jury for consideration as a defendant in this action.

• • •

(24) THE COURT: Bring in the jury.

(The jury came into the court room.)

(The jury and two alternates were impaneled and sworn.)

(Mr. Landy opened the plaintiff's case to the jury.)

THE COURT: I understand you gentlemen are going to reserve your opening.

MR. ALSPACH: I would like to, with Your Honor's permission.

MR. MOUNT: I would like if the Court approves to say just a few words at this time, which will permit the jury to understand our respective positions.

THE COURT: You are privileged to do so, Mr. Mount.

(Mr. Mount opened the third-party defendant's case to the jury.)

THE COURT: Members of the jury, we have a meeting of the judges of the entire Circuit here this afternoon, so

that (25) when you are excused you will be excused until tomorrow morning at ten o'clock.

I want to say to you, however, that in this particular suit in which you have taken your oath to try, and to try fairly under the evidence and the law as applied to the evidence, you will not, just because you have heard the opening, permit any interest to rise in your minds to the point where it will make you curious. You are sworn to try the case, as I said, in accordance with the law and the evidence, so that you will not make up your minds nor anticipate things as to what the happenings might have been until it is submitted into your hands by the Court. You will not even discuss it among yourselves, much less discuss it with anyone outside of the jury box. The case I am told will take a few days to try, several days, as a matter of fact, so that as the witnesses appear on the stand the evidence will vary, because you will not find this to be in agreement, otherwise we would not be here. The evidence will be disputed in many quarters.

Keep your mind open, keep it fair, do not discuss it, no matter how positive you may feel a witness to be, do not make it binding, because on your conscience finally and ultimately you can only determine it after you have heard all of the evidence, and after you have had the principles of law enunciated to you by the Court, and after you have applied them (26) to that evidence. When your service as jurors is over and done with here then you can feel free and be happy with your memories that you have committed no wrong anywhere along the line.

With that, members of the jury, you will be excused until tomorrow morning at ten o'clock.

You had something?

THE CLERK: At five minutes of two they are to go to court room number 4.

THE COURT: You will get just a little more than an hour for your lunch.

Tomorrow morning, members of the jury, we will meet here at ten o'clock.

(Adjourned at 12:50 P. M. to 10:00 A. M., February 16, 1950.)

• • •

(27) Philadelphia, Pa., February 16, 1950.

• • •

(28) SECOND DAY.

(The following transpired in chambers.)

MR. ALSPACH: I wish to place certain things on the record in connection with what I understand transpired subsequent to the swearing of our jury and the opening made by the plaintiff.

I understand that at approximately 1:55 yesterday Judge Clary confined the entire jury panel, including our jury, which had been previously sworn to try our case, and which had already been addressed by plaintiff's counsel. I do not know what transpired thereafter because counsel were not present upon that occasion. I have, however, noticed with a great deal of concern certain things that have come out in the newspapers since that time. My first application is that the minutes——

THE COURT: Counsel were not permitted to go into the room, do you mean?

MR. ALSPACH: We were not, no, sir.

MR. MOUNT: As I understand, no counsel were present.

(29) MR. ALSPACH: I understand to the contrary, that it was a closed session. That was the phrase used in the newspapers. So my first application is that the notes of what transpired there be transcribed and be made a part of the

record in our case, and that this trial be recessed until such time as we have had an opportunity to examine those notes and make whatever motions or applications may be desirable under the circumstances.

THE COURT: I think that is not unreasonable.

MR. LANDY: Excepting only that there is, as we see it, if Your Honor please, no reason why we can not proceed with the trial and reserve for Mr. Alspach whatever motions he wants to make, without losing time in this case, Judge McGranery.

THE COURT: Is it not all lost motion if there was something said or something done that would have some merit that would be prejudicial?

What is the use of going on with the trial if that were so?

MR. LANDY: It is conceivable that there will be nothing prejudicial.

THE COURT: That is the reason why it would be better to stop to find out where you are going first. I mean you answer that yourself.

(30) MR. MOUNT: If the Court please, there is the further technical situation that I do not think the jury should have been charged or questioned without counsel.

THE COURT: What is that, Mr. Mount?

MR. MOUNT: I do not think the jury should have been charged or questioned in the absence of counsel, if they have been sworn to try a particular case, and I make a formal motion for that reason to withdraw a juror.

THE COURT: That is the thing that bothered me more than anything else. I thought you gentlemen would have the right to go in there.

MR. LANDY: Would Your Honor consider letting us dismiss this jury and select a new jury? I am speaking now for myself, aside from the difficulties of the trial itself.

THE COURT: Yes, I think that in order that the thing may be straightened out I would be prepared to do that, and I think that would be the thing to do in this case. I do not think the jury should have been taken apart and talked to without counsel being present. I think that was the error, no matter what was said, but that seems to me to be the error in my opinion; I do not know, if it were not error in this particular matter, it leaves the door open for error to be committed in the future.

MR. ALSPACH: May I say one more thing along that (31) line, Your Honor, it seems to me that we are all talking in the dark now, without knowing what transpired; it may well be that under the circumstances, we, who are the moving parties, the prospective moving parties, would be entirely satisfied with going on with this jury. I think that since we have already drawn this jury, and it has been sworn, that it should be up to us to move with respect to this particular jury, and if in the light of subsequent developments it may appear that we are satisfied to go on with this jury, I think it would be wrong to dismiss them at this time, until we know what the facts are. That is why I want to know what transpired there.

The whole panel, for that matter, as I understand it, was brought in there, and the same things I presume were said to the entire panel. So I do not see where any other juror that might be drawn from this panel would be in any different situation, except from the technical aspect that they were talked to by another judge in the absence of counsel, but I think it is up to us as the moving parties to make an application for dismissal of the jury.

MR. LAKATOS: I do have one thought——

MR. BYRNE: We could probably have it by two o'clock, I think.

THE COURT: Certainly I would not want to be (32) pushed on trial if I were in any one of your positions.

MR. MOUNT: I do not see how we can cure this situation.

MR. BYRNE: If this jury has been talked to, it has been a reflection on the panel as a whole, and I do not think that the jurors have a free mind and an open mind to consider any case.

MR. LAKATOS: Well, you can not go that far.

THE COURT: I would not go that far.

MR. BYRNE: The newspaper accounts are rather damning to the defendants.

MR. ALSPACH: Your Honor, I have these accounts. I have not presented them because I think it is premature, but I do want to have those made a part of the record as well as the current trial list.

THE COURT: I am in thorough agreement with you that counsel had a right to be present.

MR. LAKATOS: That may be true. There is only one thought that I have in mind. There is hardly a case tried here or anywhere else where during the course of the trial something does not happen that may or may not require a new trial. The Judge does not stop the trial at that point, but continues, and rules upon that at the end of the case.

THE COURT: That is something that occurs in the (33) knowledge and the presence of the Judge himself, but here is something entirely different, where a jury is taken apart. It is too obvious to me. No argument would persuade me to the contrary if there is an application.

MR. LAKATOS: I think you may be absolutely right. The only thing is that I do not know why we should hold up the trial for that reason, because we do not do it in any situation.

THE COURT: There would be no use in my proceeding, and I certainly would not want to proceed with a trial that is doubtful as to whether or not you are finally going to withdraw a juror and continue it anyhow. Why do that?

To me that is like running around in the forest without knowing your direction. I think it is better to stop and get your bearings and then to move forward. That would be my way of doing it. Maybe there is nothing in it at all, they may feel satisfied to go ahead and go on. I do not know. Certainly I would not want anybody to push me to trial if my jury were brought apart and talked to by somebody out of my presence.

MR. LANDY: We have no desire to do that, Judge McGranery, and it may be very well that Mr. Alspach will have proper reason to ask for the dismissal of the case. What I started to say, Your Honor, was that aside from the difficulties (34) of corraling these many witnesses in this case——

THE COURT: You are not going to be hurt. I mean we are going to go on with this case next whether it is with this particular jury or with one that we will pick. I mean we are not going to continue the case generally because of that, because I think whatever damage might have been done we can cure it by remarks to the jury, that is, a fresh jury that is going to be picked, even though it comes out of this panel, unless there is something in the remarks that is prejudicial, and would be prejudicial to the entire panel.

To be very frank with you, I do not know what was said. I do not know a thing about it.

MR. ALSPACH: If Your Honor please, I would like to make it clear that there were further things that I wanted to mention which are premature at this time. I wanted to show Your Honor, if I may, the article in this morning's Inquirer, and particularly the last paragraph, which I think is the most prejudicial to us. I am referring to the last sentence in that.

THE COURT: To the insurance companies?

MR. ALSPACH: Yes, the information would be of benefit to law firms or insurance companies, indicating that some-

one in our interest procured this allegedly improper investigation. Our firm has about twenty cases on this trial list, approximately sixteen of which are jury cases, which would mean (35) we have the largest stake of anybody, and as a matter of fact we have never done this thing that has been complained of.

THE COURT: To be perfectly frank with you, I do not see any harm in investigating a panel of jurors if it is done properly

MR. ALSPACH: I do not either, but I certainly do not contend what was done here was proper.

Your Honor, may I reserve the right to offer these in evidence and make them a part of the record?

THE COURT: If it is going to be necessary.

MR. ALSPACH: I certainly want to. I thought it was premature at this time, until we know what went on. I think this would have to be judged in the light of what was said.

THE COURT: Suppose we excuse the jury until 1:30. That will give you ample opportunity to look at your notes and make up your minds about what you want to do, but I must agree that I would let you draw a new jury if you insist on it.

MR. LANDY: We are to be back at 1:30, sir?

THE COURT: Yes.

(Recess from 11:00 o'clock A. M. to 1:30 o'clock P. M.)

(36) AFTER RECESS.

Present: Counsel as before noted.

(The following transpired in chambers.)

THE COURT: All right, gentlemen, now you all have a copy of the minutes. What is your view of them?

MR. ALSPACH: If Your Honor please, I ask that the minutes be made a part of the record in this case.

I move for the withdrawal of a juror on behalf of the defendant Pope & Talbot, Inc.

I would also like to have these three newspaper clippings marked for identification, if I may, and I would also like to offer these as a part of the record in this case, if Your Honor will permit me.

Although the date and the publication in which this article appeared are not on this article, I can state that I clipped it from the upper right-hand corner of the third page of last night's Evening Bulletin. I believe it was the three-star final edition.

I ask that this be marked as Defendant's Exhibit 1-a.

(A newspaper clipping was marked Defendant's
(37) Exhibit 1-a.)

MR. ALSPACH: I ask that this clipping be marked as Defendant's Exhibit 1-b, the same being an article that appeared in the upper right-hand corner of page 3 of the Philadelphia Inquirer, the star edition which appeared on the streets last night in this vicinity.

(A newspaper clipping was marked Defendant's Exhibit 1-b.)

MR. ALSPACH: And finally I ask that this third clipping be marked for identification as Defendant's Exhibit 1-c, the same being an article which I clipped from the final edition of this morning's Inquirer, which appeared at the top of page 16 thereof.

(A newspaper clipping was marked Defendant's Exhibit 1-c for identification.)

MR. LAKATOS: If Your Honor please, in order that we might discuss it intelligently, I wonder if Mr. Alspach won't state for the record what the basis of his motion is in the light of the record as transcribed in the proceedings before Judge Clary.

MR. ALSPACH: If Your Honor please, I have looked over the record of these proceedings and if my mathematics are correct I find that ten out of the fourteen jurors who are on our jury spoke up at the time of the hearing before Judge Clary (38) yesterday.

From the cold record it is my impression that at least some of them were incensed at the fact that they had either been approached directly or that members of their families had been approached.

I further gathered from the record that many of the jurors questioned stated exactly upon what lines they had been questioned, including their attitude toward labor unions, insurance companies, and so forth.

I submit that the entire tenor of the proceeding was to the effect that there was some wrong being done by somebody here, in that someone had misrepresented himself to these jurors or to the members of their families, and that at the conclusion of that hearing it was the sense of the Court's remarks that the Court intended to do something toward rectifying those wrongs

As counsel for the defendant I can not read the minds of these jurors, naturally, I do not think it would be proper for me to say how it did affect them, but I think there is a substantial possibility that they may have been prejudiced by what took place yesterday before Judge Clary.

As far as the newspaper articles are concerned I can offer no comment on them, I think they will speak for themselves, and I likewise do not know whether any or all of (39) our jurors have read those newspaper articles.

MR. LAKATOS: I find it a little difficult to follow Mr. Alspach and I wonder if he would clarify the situation. He concluded his statement by saying that he feels that what happened before Judge Clary may have prejudiced the jury. I do not know from what Mr. Alspach said whether he means that the questions asked by the Court were prejudicial, or that the answers that were given by the jurors were prejudicial, or whether the proceedings in their entirety were prejudicial.

MR. ALSPACH: My position is that looking at what transpired as a whole the proceeding in its entirety resulted in prejudice to this defendant.

MR. LAKATOS: That is a very vague sort of statement.

MR. MOUNT: May I speak my piece?

THE COURT: Yes.

MR. MOUNT: I make a formal motion for the withdrawal of a juror. I base it upon the fact that this jury, after having been sworn, in the absence of counsel, was questioned.

I join in the motion to make a part of the record the transcript before Judge Clary and the newspaper articles which have been identified, and I wish to point out that Judge (40) Clary on page 19 of the transcript pointed out to the jurors that the approach which had been made to them was wrong, and I quote what I refer to:

> "You probably during your term of service won't hear any results, but it is our present thought that while jury investigation is a perfectly legitimate thing, that a direct approach to a prospective juror is not, and, consequently, I believe that we will from here in stop this sort of thing."

I feel that the statement from the Court emphasizing the subject of improper investigation and questioning can not but have an upsetting effect upon the minds of the

jurors. I can not be in a position to show how it will affect them if at all, I merely make my motion for those reasons.

MR. ALSPACH: I would also like to add, if Your Honor please, for the record, that we wish to enter a formal objection and a motion for the withdrawal of a juror, upon the basis that, as counsel for the defendant, as previously stated, the jury, after it had been sworn and after it had been addressed by the plaintiff's counsel, was questioned by another judge of this court outside the presence of counsel.

THE COURT: Gentlemen, following our conference here this morning, I went down first of all to ascertain whether or not the record as reported had been transcribed, and if it (41) could be made available to you gentlemen, so that you might examine it, and then we could discuss it more intelligently than we were discussing it without the benefit of the record at the morning conference, and I must confess that I do not think what Judge Clary said to the jury was harmful to anyone; however, you point out now that ten of your fourteen jurors in your particular case responded to the questions propounded by Judge Clary, which I am not too familiar with and did not read.

I am going to overrule your application with this understanding, that I will ask the jurors how they feel and if they have or entertain any prejudices. Certainly I will say to the jurors that all of you who are represented here are well and most favorably known to the Court, both as members of the bar and as gentlemen, and that certainly there is no shadow of suspicion that would attach so far as this Court is concerned to anyone in the present case and if they can on their conscience render a fair verdict in accordance with the law and the evidence I will allow the case to go on.

MR. BYRNE: I might say to you, Judge McGranery, that I am perfectly willing to be sworn when I state it, that in so far as the attorneys for the original defendant and the original defendant itself, which is a West Coast company,

we had no part in investigating these jurors and did not know it had occurred.

(42) THE COURT: I would not think of an affidavit or an oath from anyone.

MR. BYRNE: Thank you, sir.

THE COURT: So if that meets with your approval I think we can go ahead and get on with the case, because I do think—well, I am not going to pass upon the impropriety of it having been done, but I am convinced that from what I have seen of it there isn't anything, unless you have some feather-brained juror who would entertain some peculiar doubt about any one of the participants in our case here. Otherwise I think we can go on just as we might if it had never happened, and the least said about it from that standpoint the better, from the place where I sit at least.

MR. BYRNE: Did you engage anyone?

MR. LANDY: We did not engage anyone as such. We have a service, we subscribe to a service.

MR. BYRNE: Which does investigate the jurors?

MR. LANDY: Yes.

MR. BYRNE: Mr. Mount?

MR. MOUNT: I subscribe to no service and have never at any time engaged anybody to make any investigation of any juror.

THE COURT: As I said before, and I do not mind saying it for the record, I can not for the life of me see any (43) harm in a service, I mean, properly conducted, because in a metropolitan area such as we have here you ought to investigate your juries, it is not a small community.

MR. BYRNE: I want to point out one thing, that in one of the newspapers' articles——

THE COURT: I will also ask the jurors if they have read these articles in the newspapers.

MR. BYRNE: (Continuing) —the finger of suspicion, by an unknown person, but apparently a Court attache, is pointed very definitely at insurance companies—large corporations and insurance companies.

THE COURT: Let us find out how many of them read the article.

MR. BYRNE: Yes.

THE COURT: It may be there are some sensible folks that do not even bother with the newspaper.

MR. ALSPACH: I think, if Your Honor please, it may be important to ascertain, if you intend to do so, which account they read.

THE COURT: I will.

MR. ALSPACH: This one in particular (indicating), the last sentence of that.

THE COURT: I will.

In other words, what I will try to do, I will try (44) to give this jury the idea that they ought to try this case in accordance with their oath, the law, and the evidence as we put it on here. There is nobody in this case that has even the remotest shadow of a suspicion attaching to them as to their trying to intimidate or in any way influence jurors.

MR. BYRNE: If the Court please, would it be out of order, since Mr. Landy says that he has received a report from some service which does investigate jurors—I do not want to see it, would it be in order to ask that it be identified, and either sealed, or kept by the Court, and returned to Mr. Landy to produce in case there is ever any question?

MR. LANDY: If the Court ever at any time wants to ask us to produce anything, we are only too glad to produce it, Your Honor, at any time, this case or any case.

MR. BYRNE: That is fair enough, Mr. Landy.

THE COURT: I prefer to let it go at that.

MR. BYRNE: All right.

THE COURT: Now, with respect to your motion for the admission of these newspaper articles, for what they are worth, I think under the circumstances, so we will have a full and complete picture, I am going to admit them. Ordinarily I would probably say no, but because of the whole peculiar nature of the situation—there may be a bit of the dramatic in here (45) that I do not altogether recognize—it may have affected the jurors that way.

MR. LANDY: Will Your Honor grant us an exception to the admission simply of the newspaper articles?

THE COURT: Surely.

(Newspaper clippings, previously marked Defendant's Exhibits 1-a, 1-b and 1-c for identification, were marked in evidence.)

MR. ALSPACH: If Your Honor please, I would also like to have a copy of the current civil trial list properly identified and received in evidence as Defendant's Exhibit 2.

THE COURT: All right.

(Trial list beginning February 13, 1950, was marked Defendant's Exhibit 2.)

THE COURT: Is there anything that you gentlemen think I ought to say or ought not to say, either way, to the jury?

MR. LANDY: From the plaintiff's viewpoint, if Your Honor please, having read the minutes of the session before Judge Clary, I can find nothing in those minutes which would justify talking to the jury. I say that simply on the basis—not that I do not want Your Honor to do so, but because I am fearful that we may create something that is not as yet created.

THE COURT: Yes, there is that danger.
(46) How about you, Mr. Mount?

MR. MOUNT: Well, I do not have a crystal ball. I have no idea whether the jury is going to be influenced one way or the other, I can not tell. If I knew I would say exactly what I thought, but frankly I do not know, and I can not take the responsibility of guessing whether they have been influenced or whether they have not.

THE COURT: All right, then for the purpose of the record I will take the responsibility of saying just what I will do, without any further comment from anyone.

MR. MOUNT: You will give me a formal exception to your ruling on my motion?

THE COURT: Yes.

(Thereupon a short recess was taken.)

(The trial continued in open court.)

THE COURT: Members of the jury, I would like, in the presence of counsel, to make some inquiry of you.

I want you to know and to understand that this is in no wise attempting to be a busybody, nor am I in any manner attempting to say anything to you with regard to proprieties or improprieties, but in order to insure a fair trial as we in this land of ours understand a fair trial to be, and that is under the law and the evidence as we get it from the court room and not from outside sources, outside this room.

(47) I wanted to ask you first, because you did appear in another court room here, and were addressed by another judge, on the occasion of some inquiry into who had visited you and what questions they asked you in connection with your jury service here.

I want you to dismiss them, if you have any feelings about any of the parties in this particular case. These gentlemen who are trying this case are all well known and most favorably known to this Court. They are gentlemen and members of this bar in excellent standing.

There were, following your meeting yesterday, some items in the newspapers of what transpired. They gave various accounts, as newspapers are wont to do. How many of you have read the accounts or account in any or all of those papers?

(Several of the jurors raised their hands.)

THE COURT: May I ask, just starting with the first gentleman, what paper or papers you read the account or accounts in?

JUROR No. 1: I read it in the Philadelphia Inquirer, sir.

THE COURT: That remark is directed to the foreman.

In the Philadelphia Inquirer? Do you recall the (48) edition?

JUROR No. 1: No, sir, I do not.

JUROR No. 2: Your Honor, sir, I happen to have the clippings in my pocket from the Inquirer and the Bulletin. I had an argument with my daughter when it came up and I wanted to prove it to her.

THE COURT: You know this is a great country we live in and I would get rid of those clippings. As I said now, it is between ourselves, we have no quarrel. There is only one thing we are going to be concerned about and that will be in the interest of rendering a fair, impartial verdict here in this case.

JUROR No. 2: Your Honor, sir, I am not acquainted with either one.

THE COURT: I will come to that a little bit later.

JUROR No. 3: I read it in the Inquirer.

THE COURT: Do you recall the edition?

JUROR No. 3: I think the last City edition.

JUROR No. 4: Your Honor, I read it in the Inquirer.

JUROR No. 5: I read it in the Inquirer.

JUROR No. 6; Inquirer.

JUROR No. 13: Inquirer, sir.

(49) JUROR No. 14: I have read it in the Inquirer, the late city edition, last evening, Inquirer.

JUROR No. 11: This morning's Inquirer.

JUROR No. 10: No.

THE COURT: You have not bothered with it?

JUROR No. 10: No.

THE COURT: And you have not bothered with it?

JUROR No. 9: No.

THE COURT: And you have not bothered with it?

JUROR No. 8: No.

JUROR No. 7: No.

THE COURT: Did that give you ladies and gentlemen any impressions?

(No response.)

THE COURT: Did you feel or have a feeling after reading that, or after the results of the meeting in the court room yesterday, that any particular group or groups of persons were making investigations trying to influence the jurors?

JUROR No. 14: No.

JUROR No. 13: No.

JUROR No. 4 (shakes head).

THE COURT: Well, then, you feel that you could well disregard everything that transpired and apply yourselves to the trial of this case and render a fair and impartial (50) verdict under the law and the evidence?

JUROR No. 14: I do.

JUROR No. 13: I do.

(Several jurors nodded their heads.)

THE COURT: Is there anything that any of you gentlemen would like to say?

MR. LANDY: No, sir.

THE COURT: Is there anything that you would like me to inquire now?

MR. ALSPACH: No, Your Honor.

THE COURT: Well, members of the jury, that was my feeling about it, that you would not be impressed, because it is only fair to assume that some investigation will be made of jurors, but it should not be done with a direct approach; if they go into the neighborhood and inquire it is perfectly all right. We live in a great metropolitan area here. I think for most of us if some fellow would come in and try to influence us I probably know what would happen to him, we would bounce him right out. I have been rubbing shoulders with that all my life, it does not influence me one little bit. Sometimes it works the other way.

I think we can go ahead with our case.

MR. LANDY: All right, sir.

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(51) PLAINTIFF'S EVIDENCE.

* * *

(52) JOSEPH BUDD, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. LANDY:

* * *

Q. What is your occupation, Mr. Budd?
A. Longshoreman.
Q. For whom do you work?
A. Atlantic & Gulf Stevedoring Company.

Q. Did you work for them on November 16, 1947?

A. Yes, I did.

• • •

Q. Now, on November 16, 1947, what was your specific
(53) position?

A. Hatch foreman.

Q. Did you work that day aboard a vessel?

A. Yes, I did.

Q. Do you remember the name of the vessel?

A. No, I don't.

Q. Where was it?

A. Girard Point.

Q. Was that the vessel in which Mr. Hawn was injured on that day?

A. Yes, it was.

Q. What time did you go to work?

A. Eight o'clock in the morning.

Q. What were the weather conditions that morning?

A. Well, we shaped up about 7:30, and at that time it was misting rain. It rained until maybe about quarter of eight. Well, when we got on the ship it stopped raining, it was still cloudy and threatening, the skies were heavy.

• • •

Q. When you reported on board this vessel where did you go to work first?

(54) A. Number 4 hatch.

Q. Who gave you your orders to work there?

A. The ship superintendent, Joe Schultz.

Q. What were you told to do?

A. I was told to go to number 4 and make ready for loading cargo.

Q. Did you go to number 4?

A. Yes, sir.

Q. When you speak of number 4 you are speaking of number 4 hatch?

A. Yes, sir.

Q. Main deck?

A. Main deck.

Q. What was the condition of the number 4 main deck hatch when you got there?

A. Well, it was covered with all hatches, including two tarpaulins.

Q. What did you do, if anything?

A. Well, the first thing I did was to roll back the two tarpaulins, and then I took one hatch—I opened one hatch and looked in the hatch to make sure where the feeder was, and so finding the feeder in the after end I told the men who was working with me to uncover the after end over the feeder. So they did.

(55) Q. What was the first row, if you remember, of hatch boards that you took off?

A. The first row I took off would be center section directly over the feeder—over the shifting board.

Q. And that center section you say is over the shifting board?

A. Right over the center of the shifting board.

Q. Did you take any others off?

A. Well, I took off two rows on each side of the shifting board, on each side of the center of the hatch.

Q. That would be two rows off the port and two off the starboard side?

A. That means five sections, two rows on each side.

Q. Where did you place those hatches?

A. I placed the hatches on the port and starboard side of the hatch by the coaming. That means I put two on one side and three on the other on the very first hatch by the coaming.

Q. And how many rows of hatches did you uncover? I am speaking now from the after end of the hatch to the forward end.

A. I took off four sections.

Q. Four sections of hatches?

A. Four sections of hatches.

Q. How many sections of hatches did the feeder cover?

(56) A. The feeder covered three sections.

Q. Why do you take off a section of hatches beyond that which the feeder covers?

A. Well, when you are loading grain you open up enough to run in the feeder, but anyway, when you run grain, the grain came out of a bend and it hits the beam, and it spatters around, and gets on top of the deck and the hatches.

In other words, that made it so, a bad day, we couldn't take chances with the cargo getting on deck and getting wet—we were responsible for it. In other words, if you take out a section above the feeder the grain would go down and keep dry, instead of landing on the top deck.

Q. When you took off those hatches, and if I remember correctly you said there were five across and four running fore and aft——

A. That is right.

Q. —were you able then to see into the tween deck of number 4?

A. Yes, I was.

Q. Were you able to see whether there were any hatches on the tween deck by number 4 feeder?

A. Yes.

Q. Were they all off?

A. They were all on except about two.

(57) Q. And where were those two that were not on?

A. There was one on the port side of the shifting board by the feeder, and there was another one between the shifting board and the coaming, to the center I would say, off from the feeder.

Q. Was that on the port side or starboard?

A. That was more on the port side.

Q. So that both the boards that were missing were on the port side?

A. Yes.

Q. Did you see any loose hatch boards on the square of the hatch?

A. I didn't see any.

Q. Did any of your men, before you started to load, go down into the lower hold?

A. No, sir.

Q. Did any of your men or yourself go down to the tween deck?

A. No, sir.

Q. When did you start to load grain?

A. Oh, about quarter after nine, I imagine.

Q. For about how long did you load the grain?

A. Oh, about an hour.

Q. About how much grain would you judge to have been (58) loaded in that hour?

A. Oh, approximately a hundred tons, or a little better.

Q. Where does the grain come from that you are loading, Mr. Budd?

A. The grain comes from the grain elevator. That is, a house filled with grain, that comes out on a belt, and the elevator extends the length of the pier. It is a building that runs the length of the pier. Well, say—I don't know, it is about as tall as this building, I would say. It comes down on a belt and goes into the ship in a chute.

* * *

(59) Q. Where did you place your chute?

A. I placed the chute in the center of the feeder, that would be the second section aft of the hatch, the second section aft directly above the shifting board.

Q. Why did you do that?

A. In other words, we do that to try to make the ship stay on an even keel. That shifting board spreads port side to starboard side, and as long as you run it straight down that shifting board we try to get as much on one side as the other, to keep the ship on a pretty well-balanced basis.

Q. How far away is the bottom of the chute from the shifting board?

A. The bottom of the chute from the shifting board would be about, well, I would say about two or three feet.

Q. When that grain comes down from the chute it is separated by the shifting board?

(60) A. That is right.

Q. Does the grain come down fast or slow?

A. Well, it comes down pretty fast, determined upon the amount of grain that you have on the belt.

Q. Is there any spill-over of grain other than that which goes directly into the feeder?

A. Yes, there is.

Q. Where does that grain spill over?

A. It spills over the beams and bounces up over the hatch, and if you have a heavy belt on there then it can't all come out that pipe. I mean it is more like wedging itself in—do you understand—and it would fold over and come over the top of the pipe where the elbow comes over the feeder.

Q. Is there any spillage over the feeder where you take the hatch off?

A. Well, that depends on the ship itself, because the more weight we put in a ship the lower the ship goes in the water, that slackens the lines on the dock, and that causes the ship to drift up and down with the tides. As ships pass the waves would run it all over the place.

Q. I think you said you loaded for about an hour.

A. Yes, sir.

Q. What happened then?

A. Well, the grain stopped.

(61) Q. Why?

A. I went to find out, and my boss told me there had to be some repair work done by the wood butchers, and for me to cover and stand by for further orders to whatever hatch they wanted me to go.

Q. Then what did you do?

• • •

A. I replaced all the hatches, put the two tarps back, put a weight on the hatch, and stood by. In other words, I went to number 5.

Q. You put all the hatches back on the main deck of number 4?

A. Yes, sir.

Q. Put the tarps back?

A. Put the tarps back.

Q. From the time you started to work number 4 until the time you knocked off number 4—incidentally, do you know what time that was that you knocked off?

A. I knocked off, oh, about quarter after eleven, I imagine.

Q. Well, from the time you started until the time you knocked off, did you or any of your men go to the lower hold of number 4 or to the tween deck of number 4?

A. No, sir.

Q. While you were loading did you see anybody in the tween deck of number 4?

A. No, sir. No one allowed in the hatch but the men that is (62) working.

• • •

(75) JACK BLASBAND, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. LANDY:

• • •

Q. • • • What is your occupation, Mr. Blasband?

A. Foreman, Roberts Cleaning Supply Company.

Q. What do they do?

A. Clean ships.

Q. How long have you been a foreman?

A. Close to four years.

Q. Were you a foreman for Roberts on November 15, 1947?

A. I have been there since—oh, going on four years.

Q. Do you remember working on a vessel that day?

A. Yes, sir.

Q. Where was that vessel?

A. Girard Point.

Q. Do you know the name of it?

A. "Dickinson." I just can't recall the first name.

• • •

(76) Q. What time did you go to work that day?

A. Eight o'clock.

• • •

Q. Now, who was your immediate superior, who gave you your orders what to do?

A. Why, I have a superintendent over me.

Q. What is his name?

A. Larry.

Q. What orders did Larry give you that day? I am speaking now of the 15th.

A. Saturday.

Q. Saturday.

A. Well, he told me to go on there and clean the hatch out.

Q. What hatch?

A. Number 5.

Q. Did you work in other holds?

A. In 4. We finished 4 up. We were supposed to have 2, 3 and 4 done by eight o'clock in the morning.

Q. Now, when you got to the "Dickinson" on the 15th what (77) was the condition of the main deck hatch covers?

A. They were on.

Q. Did you open them up?

A. No, sir.

Q. Did you go into number 4?

A. Yes, sir.

• • •

Q. You went into number 4 hatch?

A. Yes.

Q. Where did you go first in number 4 hatch?

A. Lower hold.

Q. What kind of light did you have in the number 4 hold?

A. When we went aboard the ship it was raining, we can't work when it rains. What I mean we can't open the hatches. So we have to go to the mate and get lights off the mate.

(78) Q. What kind of lights?

A. Cluster lights.

Q. What are they?

A. I guess they are about twenty inches in diameter, around.

Q. How many bulbs in them?

A. Five, four.

Q. How many of those cluster lights did you get?

A. Four.

* * *

Q. You got down into the lower hold, what did you do? I am speaking of number 4. What did you do?

A. Brought the dirt up through the escape hatch and dumped it on deck.

Q. How did you bring it up?

A. With a heaving line and a bucket. We have five-gallon paint cans.

Q. When you got through with the lower hold where did you go?

(79) A. The tween deck.

Q. What did you do for lights there?

A. Brought the lights up and put them where we wanted them.

Q. On the tween deck?

A. That is right.

Q. You didn't open up the main deck hatch covers?

A. No, sir.

Q. Did you clean up the tween deck?

A. Yes.

Q. How did you get your rubbish out of the tween deck?

A. Through the escape hatch.

Q. Now, when you got to the tween deck of number 4, were you able to observe that portion of the hatch which was forward of the feeder?

A. Yes.

Q. Were there hatch boards on or off forward of the feeder?

A. They were on with the exception of a couple were off.

Q. Do you know where they were off?

A. No, I do not.

Q. You don't know whether they were off on the port or the starboard side?

A. No.

Q. Do you know how many rows of hatch boards there were?

A. Two.

(80) Q. Did you see any loose hatch boards down there lying on the square of the hatch?

A. No.

Q. Then when you got finished with the tween deck what did you do?

A. We brought all the gear up, that is, the brooms, shovels and stuff that we used, brought it up, and went down in number 3.

* * *

Q. Now the next day would be the 16th, on a Sunday. Were you working the ship that day?

A. Yes, sir.

Q. Where were you working.

* * *

A. Number 3.

Q. Did you have lights?

A. Yes, sir.

(81) Q. Where did you get those lights?

A. Off the mate.

Q. How many?

A. Four.

Q. The same kind of cluster lights you used the day before?

A. Well, they could have been a little different. What I mean is we used four lights. Some ships you go on they have different lights.

• • •

(82) Q. Let me ask you this, Mr. Blasband, while you were down in number 4 tween deck could you see all of your men?

(83) A. Well, we had some on this side and some on that side, I just kept walking around.

Q. Did you see any of your men put on or take off any hatch boards on number 4 tween deck?

A. No.

• • •

CROSS-EXAMINATION.

By MR. ALSPACH:

• • •

(85) Q. These hatch boards that you have told us about were right forward of the hatch, weren't they?

A. Yes, sir.

Q. You don't recall whether there is a shifting board?

A. No, I don't pay much attention to shifting boards.

Q. What caused you to pay attention to the hatch boards?

A. Because we clean them off.

Q. Oh, you clean them off?

A. Yes, sir.

Q. Did you clean them off that day?

A. Saturday.

• • •

(88) Q. Well, did you and your men do a good job of cleaning up the number 4 tween deck when you were over there?

A. We never had any complaint.

Q. I am asking you. You are a ship cleaner of wide experience?

A. Yes.

Q. Did you do a good job that day?

A. We did.

Q. And when you left the number 4 tween deck you were satisfied that you had done a good job?

A. That is right. You see, we could tell the job is good. And then the inspector could come along and tell them—if he sees any water. It is my job to see it is done right so I don't have to go back there again.

Q. Do you recall the grain inspector making any complaint aboard the "Dickinson" about the tween deck in number 4?

A. No.

• • •

(90) Q. Now, my question is, you don't remember, do you, what the arrangement was of the tween deck hatch boards on the ship after the "John Dickinson"?

A. No.

• • •

By Mr. Mount:

• • •

(91) Q. Did you sweep off all of the hatch covers in number 4 tween deck that day?

A. All except the feeder, yes, sir.

Q. Did you sweep up all the space, the open space in the wings of number 4 tween deck?

A. Yes, sir.

Q. Did you take out of that hatch all of the dirt and refuse that you swept up?

A. Yes, sir, all except any big dunnage we left there, that is, in the tween deck, against the bulkhead, that is, if there is any down there.

• • •

(93) Q. Now, in number 4 tween deck you said there were some hatch covers off.

A. Yes, sir.

Q. How many?

A. A couple.

Q. Where were they located? What was the location of the spaces where the hatch covers were off?

A. Oh, I don't know.

Q. You don't know?

A. No.

Q. Which side of the ship were they located?

A. I don't know.

Q. Well, do you know that there were a couple off?

A. Yes.

Q. How do you know that?

A. Because I saw them off.

Q. When you saw them where were you standing?

A. I have been all over the ship, I walk around, I just walk (94) around to see if the men is working.

Q. How do you happen to remember that there were two off?

A. Well, I saw them, there is two spaces there, so there must have been two out.

Q. Well, you did look to see there were two off?

A. Well, I was standing almost from here to there (indicating) away from them.

Q. Now, then, when you looked and saw there were two empty spaces where the hatch covers were off, tell us where they were.

A. You mean the space?

Q. Yes.

A. I don't know, it could have been either the second or the third one, I don't know.

Q. Which side of the ship?

A. On the port side.

Q. Oh, it was the port side?

A. Yes.

Q. Were both of them off on the port side?

A. It seemed that way, yes.

Q. What do you mean, it seemed that way? It is either on the port side or the starboard side.

A. There is two rows of hatch covers.

Q. Yes.

(95) A. So I don't know how many, or in a row, so I don't know whether it was the second, or the third, or the fourth row.

Q. Were they both off on the port side of the ship?

A. There were two off, as I say, I don't know whether they were off on the port or starboard, but they were off.

• • •

Q. Answer this: Can you remember——

A. If I turned around——

Q. Wait until I finish my question. Can you remember whether the hatch covers were off on the port side of the ship or off on the starboard? Can you remember that?

A. Not offhand, no.

Q. Well, remember it on hand then. See if you can remember it on hand. Can you remember after thinking about it?

A. At the side you come up on the ladder.

Q. What is that?

A. The port side.

Q. They were on the port side?

A. Yes. I will say the port side.

(96) Q. You will say the port side?

A. Yes.

Q. But can you remember?

A. But I can't swear that it was off on the port side or the starboard side or what side. I am not going to say exactly for sure when I don't know.

• • •

WILLIAM HAWN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. LANDY:

* * *

(97) Q. Are you related to the plaintiff in this case?
A. Yes, sir, he is my dad.
Q. What is your occupation?
A. Carpenter.
Q. What was your occupation November 16, 1947?
A. Ship's carpenter.
Q. Whom did you work for?
A. Haenn Ship Ceiling and Refitting Corporation.
Q. Were you on board the "John Dickinson" that day?
A. Yes, I was.
Q. Is that the day your father was in an accident?
A. That is right.
Q. Whose gang were you in?
A. My dad's gang.
Q. What time did you go to work?
A. About eight o'clock in the morning.
Q. What was the condition of the weather that day?
A. Well, it was cloudy and like mist—like misty.
Q. Where did you go to work first?
A. Well, we went to number 3.
Q. To number 3 hatch?
(98) A. Yes, sir.
Q. Or number 3 hold, rather?
A. That is right.
Q. Who gave you your orders to go there?
A. Well, my dad gave me my orders.
Q. Where did you work in number 3?
A. Well, we worked some down in the lower hold and then up in the tween deck.
Q. How long did you work in number 3?

A. Well, it was about half past two, quarter to three, when we finished up.

Q. Where did you go after that?

A. We went back to number 4 hatch.

Q. Who told you to go to number 4?

A. My dad.

Q. Did you walk across the main deck to number 4?

A. Yes, I did.

Q. Were you able to observe the condition of the main deck hatch of number 4?

A. Yes, sir.

Q. What was it at that time—incidentally, am I correct when I say this was around 2:30 or 2:45, you said?

A. That is right.

Q. What were the conditions of the main deck hatch covers (99) at that time on number 4?

A. Well, the tarpaulins were still on, and they had just the end hatches on each side up on cleats, they were only about eight inches high, they were just stuck up on the ends, just to get a little light down in the hatch.

Q. Which side?

A. On both sides, port and starboard.

Q. How many of those boards?

A. Well, every one on each end, just one section on each end.

Q. Were there any hatch boards off number 4?

A. Well, there was two I think by the forward ladder.

Q. Did you go down into number 4?

A. Yes, I did.

Q. How did you go down?

A. In the escape hatch.

Q. Did you go down with your father?

A. Yes, we both went down the escape hatch.

Q. And you came down on the tween deck of number 4?

A. On the tween deck.

Q. What was the condition of light when you got to the tween deck of number 4?

A. Well, there was hardly any light at all.

Q. Was there any artificial light down there?

(100) A. None whatsoever.

Q. Did you go to work there?

A. Yes, I did.

Q. What did you do?

A. Well, I went on—I started to cut the corner out of the feeder on the port side.

Q. Forward or aft?

A. Aft.

Q. Who told you to do that?

A. My dad.

Q. What was the condition of the deck of the tween deck?

A. Well, it was slippery.

Q. What made it slippery, if you know?

A. Well, there was a lot of grain dust and grain on the deck.

Q. Did you have occasion at any time to go to the forward end of number 4 tween deck?

A. No, I didn't.

* * *

(101) CROSS-EXAMINATION.

By MR. ALSPACH:

Q. Mr. Hawn, what was the condition of the weather when you went from number 3 hatch into number 4 hatch?

A. Well, it was cloudy.

Q. Was it cloudy then?

A. Yes, sir.

Q. Was there any rain coming down?

A. No, there was no rain at all.

Q. I believe you said that you started work that morning at number 3, is that right?

A. That is right.

Q. When you got to number 3 the first thing in the morning (102) what did you do with the main deck hatch boards of that hatch?

A. Well, that hatch, we took off every other one.

Q. You took off every other one, so that you had a sort of checker board pattern?

A. Yes.

Q. One off and one on?

A. Yes, sir.

Q. Those hatch boards are what, about four and a half, five feet in dimensions?

A. Yes, sir.

Q. On how many strips of hatch boards did you do that at number 3?

A. I believe mostly all but the last one.

Q. All but the last one?

A. Yes, sir.

Q. And how many men employed by the Haenn Ceiling Company assisted in placing the hatch boards in that manner?

A. I think there was about five or six, something like that.

Q. About five or six of you?

A. Yes, sir.

Q. How long did it take you to open up the hatch in that fashion?

A. Oh, it would only take a few minutes.

Q. It would only take a few minutes for five or six men to (103) arrange the hatch boards that way?

A. Yes, sir.

Q. And you placed each one you took out on top of its neighbor, is that right?

A. Yes, sir.

Q. So that you could put them back again quickly if you had to?

A. Yes, sir.

Q. How long does it take to push one of those hatch boards back into position when it is arranged in that fashion?

A. Well, that is really a hard thing to say, because every hatch board might not be the same width, they might be knocked out of shape.

Q. It the hatch boards are all of the proper size, if they fitted when you got there, they would be apt to fit when you put them back again?

A. That is right.

Q. If the hatch boards are in that condition how long does it take you to replace one of those?

A. Well, only about a half a minute, I guess.

Q. It takes just a matter of a few seconds, doesn't it?

A. A few seconds, yes, sir.

Q. Were you working in the hatch square of number 3 or were you working over in the wings of the ship?

(104) A. I think I was working in the wings of the ship in number 3. In fact, it was all over the tween deck.

Q. Did you have enough light in number 3 to work by by reason of having those main deck hatch boards off that way?

A. Well, it wasn't any too good.

Q. You were working in the wings and that is the area that is farthest away from the hatch square?

A. Yes, sir.

Q. There was plenty of light in the hatch square?

A. It would have been plenty.

Q. You had right there at intervals of two and a half feet an opening of two and a half by five, is that right?

A. That is right.

* * *

THE COURT: All right, then we will recess.

Members of the jury, we will recess at this point until tomorrow morning. Some of our friends here have an appointment in the morning, so we will meet at 10:30.

In the meantime, carry with you the admonition (105) that I gave to you yesterday, that you are not going to discuss this matter among yourselves, and

certainly not with anyone else, and as far as the newspaper clippings are concerned, you can drop them off on the way home. Forget that it ever even happened.

Tomorrow at 10:30.

(Adjourned at 3:30 P. M. to 10:30 A. M., Friday, February 17.)

• • •

(107) MR. LANDY: If Your Honor please, I would like to read into the record the entries of the logbook on the S. S. "John Dickinson" for the days of November 15 and November 16, 1947.

• • •

(108) November 15, 1947, twelve o'clock. (109) Relief Mate J. Bergen relieves ship's officer.

Thirteen o'clock Army Lieutenant Sheick and Sergeant Hill inspect all holds.

Thirteen five, two gangs cleaners from Robbin Co. aboard.

Sixteen o'clock, overcast and drizzling.

Seventeen o'clock, cleaners knock off for day.

Twenty o'clock, overcast, light drizzle. Routine inspections.

Twenty-four o'clock, overcast.

Now for Sunday, November 16, 1947.

0000 A. Peters night mate relieved J. Bergen, night mate.

Four o'clock, frequent routine inspections—all secure—occasional rain.

Eight o'clock, 40 carpenters and 25 cleaners aboard preparing holds 1 and 4. Stevedores aboard.

Nine o'clock, commence loading number 4 hold.

Nine o'clock, first draft of grain in number 1 hold, 0905 Detained in number 1 and number 4 due to belt breakdown.

Nine fifty, continue to load in number 1 and 4 holds.

Eleven o'clock, stevedores knock off number 4, (110) shift to number 5 hold.

Twelve o'clock, stevedores knock off for lunch.

Thirteen o'clock, resume loading number 5 holds.

Fourteen fifty, Carpenter C. Hawn fell from number 4 tween decks into lower holds. Doctor and ambulance immediately called and patient sent to hospital.

• • •

The weather report as recorded in the log on the day of November 16, 1947, is:

4 A. M., cloudy.

Nine o'clock, cloudy.

Twelve A. M., cloudy.

Four P. M., partly cloudy.

Eight P. M., fine and clear.

(111) Twelve P. M., partly clear.

• • •

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(114) SOL RASKIN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. LANDY:

• • •

Q. Mr. Raskin, what is your occupation?

A. Carpenter.

• • •

Q. On November 16, 1947, were you working for Haenn Ship?

A. Well, I wouldn't be sure on the date, but the day of the accident, I mean the time of the accident, I was.

Q. When you say "accident" you mean an accident to Mr. Hawn?

A. Yes, to Mr. Hawn.

• • •

(115) Q. Did you work in a hold?

A. That is right.

Q. How long did you work there?

A. Oh, up until a little—up to eleven that morning.

Q. Then what did you do?

A. Then we got orders to go in number 4 hatch.

• • •

(116) Q. Can you tell us the condition of the main deck hatch covers of number 4 when you got there?

A. They were all on.

Q. What if anything did you do, or did the Haenn Company men do that you saw them do?

A. Well, they were pushed up—raised up on the wedges.

Q. What was it that they raised up?

A. The hatch covers.

Q. How many?

A. Well, I guess about two on each side of the forward end of the ship.

Q. Do you mean two on the port side and two on the starboard side at the forward end of number 4?

A. Yes, sir.

Q. Did you or any Haenn Company man that you saw take any hatch covers off number 4?

A. Main deck?

Q. Main deck.

A. No. I wasn't the only one in the hold.

Q. When you got to the number 4 were there any hatch covers off the main deck?

(117) A. One at the ladder.

Q. Where is the ladder?

A. The center part of the ship, the hatch.

Q. Forward or aft?

A. Forward.

Q. Did you go into number 4—

A. That is right.

Q. —tween deck?

A. Right.

Q. How did you get in?

A. Through the ladder.

Q. When you got to the foot of the ladder what did you step on?

A. I stepped part on that, what do you call that—tanks, and then down in the hatch.

Q. Now, when you got down to the number 4 tween deck were the hatch boards on number 4 tween deck on or off?

A. They were on as far as I could see.

Q. Before you went into number 4 tween deck did anybody tell you that there were any hatch boards off of number 4 tween deck?

A. Not me.

Q. Did you hear anybody say anything to anybody?

A. No, sir.

(118) Q. What was the condition of light down at number 4 tween deck when you got there?

A. Well, there wasn't much light—from artificial light—because they were propped up, and the tarpaulins was pulled over, just so they can see to get around the forward end of the ship.

Q. What was the condition of the deck and hatch boards of number 4 tween deck?

A. What do you mean, condition?

Q. Well, how were they?

A. Well, there was some grain dust, or oat dust, whatever you call it, all over the deck, and on the hatch covers some.

Q. What kind of a footing did that give you?

A. Slippery.

Q. How long did you work down in number 4 tween deck?

A. That day?

Q. Yes.

A. Well, we got there before lunch, a little before lunch, and then the accident happened between two and

three, I guess I would say about four o'clock, but not positive.

• • •

(119) Q. Where were you when the accident happened?

A. I was on the inshore side, port side.

Q. Were you working on the deck or on the hatch square?

A. No, I worked on the deck.

Q. Was there a feeder down in this number 4 tween deck?

A. Yes, sir.

Q. How many rows of hatch boards forward of the feeder were there in number 4 tween deck?

A. Two.

Q. When is the first you knew about an accident?

(120) A. Well, I would say just about a minute or so after he fell down, and somebody hollered, "Do you know Cap Hawn fell down a hatch?"

Q. Then what did you do?

A. Then I walked towards the square and looked over into the hold, and the way I could see, there was a space missing there for a hatch cover.

Q. That hole that you are talking about, where was that?

A. On the nearest to the feeder, that would be right close to the feeder.

Q. On the row of hatch boards close to the feeder?

A. That is right.

Q. And where was the space with respect to the port coaming and the center shifting board?

A. I would say that my best recollection would be the third hatch cover from the coaming.

Q. From the port coaming?

A. That is right.

Q. Did you look down into that opening when you got there?

A. When I got where?

Q. When you got there right after the accident.

A. Yes.

Q. Did you look down into it?

A. Yes.

(121) Q. Did you see anything?

A. Yes, that is where I could see Cap Hawn lying, through that opening.

Q. You saw him right under that?

A. That is right.

* * *

Q. While you were down in number 4 tween deck, from the time you first went down there at eleven o'clock in the morning, or shortly thereafter, until this accident happened, did you touch any hatch boards?

A. No, sir.

Q. Did you put any on or off—take any off?

A. No, sir.

Q. Did you see any Haenn Company man touch any hatch (122) boards?

A. No, sir.

Q. Did you hear any Haenn Company men ask for lights?

A. I think that somebody asked for lights.

Q. Do you know who?

A. I don't know.

* * * *

CROSS-EXAMINATION.

By MR. ALSPACH:

* * *

(125) Q. When you came to the number 4 hatch to start work there was it the Haenn men, the Haenn Ship Ceiling men who tilted up those main deck hatch boards?

A. What do you mean, shored up?

Q. I believe you stated that you wedged up some.

A. Yes, sir, topside.

Q. It was the Haenn men that did that?

A. That is right.

• • •

Q. Now, exactly where were you standing when you learned of Mr. Hawn's accident?

A. What do you mean, "exactly"?

Q. Well, tell us what position down in the tween deck you were standing.

A. You mean what part of the ship?

Q. Yes.

(126) A. The forward end by the port side.

Q. Were you by the shifting board or were you over by the coaming?

A. No, I was on the coaming side, the steel side.

Q. What were you doing there?

A. Well, I was putting up—making solid shifting planks. I don't know exactly what I did at that particular moment.

Q. When you first observed this opening in the hatch where were you standing?

A. You say at first I was where? When Hawn fell down?

Q. You said after the accident, you said there was one hatch board out, is that right?

A. I said I was called into the square of the hatch.

Q. Yes.

A. When they told me he fell down that is the time I observed it.

Q. Now, when you observed it, where were you standing?

A. I was standing on the hatch cover and towards the coaming side.

Q. There is no doubt in your mind but what you saw that one opening there, is that right?

A. That is right.

Q. I believe you testified that you think that somebody asked for lights, is that correct?

(127) A. That is right.

Q. That was one of the Haenn men down in the hold, was it?

A. That is right.

Q. And he was talking to another Haenn man, wasn't he?

A. That is right.

Q. Now, when you were down there in that hatch working during the day you didn't have time to pay attention to what all the rest of the men were doing, did you?

A. That is right, which is none of my business.

Q. So you are in no position to say whether or not any of the other men actually moved any of the hatch boards, are you?

A. I said no, I don't know.

Q. You don't know whether they did or not?

A. That is right, I don't know.

* * *

By Mr. Mount:

* * *

(132) Q. Now, you have worked in holds before where some or all of the hatch covers have been off, haven't you?

A. In other ships, you mean?

Q. Yes.

A. That is right.

Q. And it is not unusual for some of the hatch covers to be on and some to be off, is it?

A. Well, in some cases there is—well, we come in on the (133) ship and the hatch covers off, ends tilted, we put them on, we put them all on.

Q. You put some on or all——

Mr. Landy: That is not what the witness said. He said: We put them all on, we put some on.

Mr. Mount: Don't interrupt me.

MR. LANDY: If Your Honor please, if Mr. Mount is going to repeat the witness' testimony then he ought to repeat it correctly.

By MR. MOUNT:

Q. Sometimes you go in and you put some of them on, and sometimes you put them all on, isn't that right?

A. No, sir.

Q. What is right?

A. If there are hatch covers missing we put them on, we make sure we don't leave any gaps in between.

Q. Sometimes in the course of doing the work which you have to do it is necessary to take hatch covers off, isn't it?

A. Yes, sir.

Q. In other words, the hatch covers are there to be taken on and off as necessary, is that right?

A. In some cases, yes.

Q. During the time you were working on this shifting board did you walk on the hatch covers on the square of the hatch?

(134) A. During that time, yes, sir.

Q. How many times did you walk on it?

A. I can't tell you.

Q. What?

A. It is impossible for me to tell you how many times.

Q. Let us put it this way: During the time you were working on the shifting board you had to be on to and from the center of the ship and the side of the ship?

A. Right.

Q. And in order to do that you had to walk over the hatch covers, didn't you?

A. That is right.

Q. During the time you were working there did you see any hatch covers off?

A. No, sir.

By Mr. Alspach:

Q. Who was the boss down in the number 4 hatch that day?

A. The carpenter boss?

Q. Yes.

A. Steve Skalicky.

Q. And you men that were working down there took your orders (135) from Steve Skalicky, didn't you?

A. Yes, sir.

Q. There were no ship's personnel down there, were there?

A. In the hatch?

Q. Yes.

A. No, sir.

* * *

STEPHEN SKALICKY, having been duly sworn, was examined and testified as follows:

Direct Examination.

By Mr. Landy:

Q. Mr. Skalicky, what is your occupation?

A. Foreman, ship's carpenter foreman.

Q. Whom do you work for?

A. Haenn Ship Ceiling.

Q. How long have you been working for them?

A. Eight or ten years.

Q. Were you a ship carpenter foreman for Haenn on November 16, 1947?

(136) A. Yes.

Q. Were you working aboard the vessel on which Cap Hawn was hurt that day?

A. Yes.

Q. What time did you go to work that day?

A. Eight o'clock in the morning.

Q. How many men in your gang?

A. I hired seven or eight men I think, I couldn't exactly tell you. I don't remember that.

Q. Was Cap Hawn in your gang?

A. No, sir.

Q. He is a hatch foreman just like you are?

A. That is right.

Q. Then I will ask you, what was the condition of weather when you went to work that day?

A. Well, it was cloudy and threatening rain. I think it rained a little in the morning, I am not sure.

Q. When you got on board the vessel where did you go to work first?

A. I don't remember what hatch we went to that morning, you see.

Q. Was it another hatch other than hatch number 4?

A. I don't remember which hatch it was, it was another hatch.

Q. Incidentally, where did you get your orders from?

(137) A. The ship boss.

Q. Who was that?

A. Freddy Knopf.

Q. An employee of Haenn Company?

A. That is right.

Q. How long did you work in the hatch into which you first went to work on board this vessel?

A. In the other hatch?

Q. Yes.

A. I just can't remember now. I know we worked in the hatch. You see, it is so far back I can't remember.

Q. Did you finish your work there? Did you finish your work in that hatch?

A. I don't know whether we finished that hatch or not.

Q. Did you leave that hatch and go to number 4?

A. Yes, we left that hatch.

Q. Was it before your lunch hour or after?

A. I can't remember whether it was before lunch or after dinner. I can't remember that, see.

Q. Did you take your gang with you?

A. Yes, sir.

Q. Do you remember the condition of the main deck hatch covers at number 4 when you first got there?

A. They were closed up.

(138) Q. Tarps over them?

A. Yes, sir.

Q. What did your men do to the main deck hatch covers of number 4?

A. They raised the hatches up on each end and put wedges under them.

Q. Why did you do that?

A. To get light in the tween deck.

Q. Why didn't you take the hatches off?

A. Otherwise we can't take hatches off on account of grain down in the hold they claim.

Q. Is that what you generally do in this kind of weather, I mean wedge your hatches?

A. Just put wedges underneath the ends.

Q. How big are those wedges?

A. Oh, they run nine or ten inches, see.

Q. And you wedged the hatch boards on each side?

A. Both sides.

Q. Were any hatch boards taken off of the main deck?

A. When we got there?

Q. Did your men take any off?

A. The only hatch we took off was the hatch with the ladder to go down the hold.

Q. That is at the forward end?

(139) A. That is at the forward end, yes.

Q. In the center of the hatch?

A. That is right.

Q. You went down into number 4 at that time?

A. Yes, sir.

Q. Before you went down to number 4 did anybody tell you that there were any hatch boards missing——

A. No, sir.

Q. —out of the tween deck of number 4?

A. No, sir.

Q. When you got down to the tween deck of number 4 were the hatch boards on the tween deck on or off?

A. In the tween deck?

Q. Yes, in the tween deck.

A. They were on as far as I could see.

Q. That is forward of the feeder?

A. That is right.

Q. What was the condition of light when you got there?

A. Well, it wasn't so good, see.

Q. Did you ask for light?

A. I asked for light when we was on top of the deck.

Q. Whom did you ask?

A. I asked—I don't know what he was, a mate or one of the crew, I don't know what he was.

(140) Q. But he was a member of the crew belonging to the ship?

A. That is right.

MR. ALSPACH: Now, if Your Honor please, I object to that. The witness has not identified that man as a member of the crew or belonging to the ship. I object to his stating a conclusion that he was.

MR. LANDY: If Your Honor please, it is perfectly normal that these men do exactly that, talk to the ship's personnel without finding whether they have signed articles.

THE COURT: I think it is easy enough to find out. He said he was a mate or a member of the crew.

By THE COURT:

Q. What made you think he was a member of the crew?

A. I don't know who he was, see, because I didn't know him, so I asked him for lights, that is all.

Q. Did he give you the lights?

A. All he told me is O. K., see, because when I went to him I said: Chief, how about getting some lights for this

hold? I said: Chief, how about getting some lights for this hold? I said: We need lights down in this hold. But I didn't know who he was.

Q. Well, did he get the lights for you?

A. He got the one light. I don't know who brought the light. We were down in the hold, somebody lowered a light down to us, (141) see.

MR. LANDY: May I ask in that connection another question, if Your Honor please?

THE COURT: Yes.

By MR. LANDY:

Q. Was the man you were talking to in uniform or in civilian clothes?

A. Well, he wasn't in a uniform. He got a pair of khaki pants on. I don't just remember what else he had on.

Q. Was he wearing a cap or not?

A. I didn't take notice, see.

Q. What was the reply that the person gave to you?

A. He said O. K. to me, that is all.

MR. LANDY: If Your Honor please, I think that is sufficient to indicate that the person who was asked is the person whom he would under those circumstances generally.

MR. ALSPACH: I object to that, if Your Honor please, and I object to his arguing it in front of the jury. He said the man had a pair of khaki pants on. There were 75 people working on the ship that day, and I would venture to say many had on khaki pants. That is all he had to say about this man's description.

THE COURT: It is not very definite. You ought to tie it in a little better. I do not know how you can with (142) this witness.

By Mr. Landy:

Q. Mr. Skalicky, what is the customary procedure for you as a hatch foreman when you want lights? What do you do working on board a vessel?

Mr. Alspach: I object to that, if Your Honor please, as it is not the customary procedure, we want to know what happened that day.

The Court: He can establish the customary procedure, and then, was it followed that day?

Mr. Alspach: If it was followed I have no objection.

By Mr. Landy:

Q. What do you generally do when you want lights?

A. We ask for lights, when we go down there.

Q. Whom do you ask?

A. Who we can see, we ask some kind of ship boss to get lights for us.

Q. Do you take lights with you?

A. No, sir.

Mr. Landy: Under the circumstances, if Your Honor please, I am perfectly willing to have that portion of the testimony in which I refer to him as a member of the crew stricken.

(143) The Court: Very well.

Mr. Alspach: As an officer or member of the crew, I think it was.

Mr. Landy: All right.

The Court: All right.

By Mr. Landy:

Q. Did you subsequently get a light or lights?

A. They brought one down.

Q. Who brought it down?

A. I don't know who brought it down, when we was down in the hold somebody sent a light down to us.

Q. What kind of a light was it?

A. A regular cluster light.

Q. What is a cluster light?

A. Well, it is a big light that has—some of them—where you could put four bulbs in or five bulbs in, see, and some you could put one bulb in.

Q. Of a very large size?

A. It is a big size.

Q. What kind was this?

A. This had four or five connections.

Q. How many bulbs were in that cluster light that you got down there?

A. One bulb, I think there was only one bulb in there.

(144) Q. Did you get any other lights?

A. No, we didn't get any other lights.

Q. What was the condition of the deck and the hatch boards when you got down there in number 4 tween deck?

A. On the hatches?

Q. What was the condition of the deck and the hatch boards?

A. Well, there was a lot of dust in there and grain, see, dust and grain.

Q. What kind of a footing did that give you?

A. It was slippery, see.

• • •

(146) CROSS-EXAMINATION.

By MR. ALSPACH:

Q. You were the boss for the Haenn Ship Ceiling & Refitting (147) Corporation down in number 4 tween deck, weren't you?

A. Yes, sir.

Q. And you were one of the first Haenn employees who went down in that hold?

A. No, I wasn't the first one, see.

Q. Who was first?

A. I don't remember who was down there.

Q. Did a group go down together?

A. We all started to go down together. I don't remember who was the first one to go down.

• • •

Q. About how many men were in your group who first approached number 4 hatch before you went down?

A. I just can't exactly remember now, I don't know whether it was seven or—I can't exactly remember.

Q. When you got there did you instruct your men to arrange the hatch boards in the manner that you told us they were arranged?

A. Yes, sir.

Q. You told them to do it that way?

(148) A. Yes.

Q. How many hatch boards did you say were arranged in that manner?

A. Three.

Q. Three on each side?

A. Three on each side, three on the port and three on the starboard side.

Q. How many hatch boards are there altogether in that first strip?

A. I don't know, I couldn't tell you, I never counted them.

Q. They are two and a half by five feet, aren't they?

A. I don't remember that.

Q. Give us your best recollection of how many hatch boards there were on that first strip.

A. I can't tell you, I never counted them.

Q. In any event, you took off, or rather you raised up three on the starboard side and three on the port side?

A. That is right.

Q. And you took off the one by the ladder?

A. That is right.

Q. You removed that, didn't you?

A. We just lifted it up and set it across, see.

Q. That means you had a total of seven boards which were moved in one manner or another, is that right?

(149) A. Yes, sir; seven. That is three on each side and one in the middle, that is seven.

Q. You have had occasion to handle hatch boards a great many times in your experience, haven't you?

A. Well, off and on.

Q. Well, you know how to move them, of course, don't you?

A. Yes.

Q. Do they have a handle on either end?

A. Yes.

Q. There is a depression cut out in the board with a metal strip across that you can grab on to them?

A. Yes, sir.

Q. Now, when you went down in that hatch that day you gave (150) the orders to the men, didn't you?

A. Yes, sir.

Q. When you got down there for the first time on the tween deck did you look around to see whether all the tween deck hatch boards were in place?

A. Well, when I got down there, I got down and I stepped on the hatches, and I thought sure all the hatches were on.

Q. You thought sure they were on?

A. I didn't take any notice of any hatches being off.

Q. You didn't look?

A. I didn't take notice.

* * *

Q. Now, these hatch boards which you had wedged up as you (151) have indicated were right at the forward end of the hatch, weren't they?

A. In the square, in the forward end.

Q. In the square of the hatch in the forward end?

A. That is right.

Q. And this shifting board was right underneath the square of the hatch in the forward end, wasn't it?

A. That is right.

Q. And the forward end of the feeder box?

A. That is right.

Q. (Continuing) Was in the forward end of that hatch, too, wasn't it?

A. That is right.

* * *

(153) Q. How was the feeder box on the inside on the "John Dickinson"; do you know whether it had burlap or not?

A. I couldn't tell you, I didn't look in.

Q. About how many men were banging on that feeder box with hatchets?

A. I think about three men.

Q. In addition to those men the ones who were working making that shifting board solid, were attaching the end of the shifting board to the forward end of the feeder, weren't they?

A. Yes, sir.

Q. They had to bang away with their hammers to do that, didn't they?

A. Yes, sir.

Q. When you bang away on that feeder box with a lot of hammers or hatchets, that throws up a lot of dust, doesn't it?

A. That creates a lot of dust, not exactly what you call a lot of dust.

(154) Q. But it does create dust?

A. Dust, yes.

Q. And if there are any loose particles of grain in that feeder box they are knocked loose, aren't they?

A. If they are knocked loose they fall right down the hatch.

Q. They fall wherever they land?

A. They fall wherever they land, that is right, you can't tell where they are going.

Q. Was there anything unusual about the working conditions down there in number 4 that day, anything at all out of the way?

A. No, sir.

Q. Nothing at all?

A. No, sir.

Q. And you are an experienced ship foreman, aren't you?

A. Yes, sir.

Q. I believe you mentioned that a cluster light was sent down into number 4 tween deck.

A. That is right.

Q. Wasn't it a fact that all you knew was that you saw this light coming down from above on an extension cord?

A. Yes, sir.

Q. You didn't see who sent it down?

A. I didn't see who sent it down, no.

• • •

(155) Q. After that light was lowered down on the extension cord did you say anything to anyone after that time about more light?

A. No, sir.

Q. And none of the men said anything about more light after that time, did they?

A. I didn't hear anybody. I was at the after end, I didn't hear anybody.

Q. I didn't hear that.

A. I was at the after end, I didn't hear anybody.

Q. Since you were at the after end you don't know whether or not any of the Haenn men moved those hatch boards up forward of the feeder box, do you?

A. No, sir.

Q. You were in no position to see, were you?

(156) A. No, not all the time, see.

Q. I think you mentioned in your direct examination that sometimes you ask the ship boss for lights, that would be your foreman, the head man for the Haenn Ceiling and Refitting Corporation?

A. That is right.

Q. And in this case on the ship this day that was Fred Knopf, wasn't it?

A. That is right.

* * *

By Mr. Mount:

* * *

(158) Q. And in order to make this shifting board tight your men had to take that lumber out, and measure it, and saw it, so it would fit in with what you had up there, is that right?

A. That is right.

Q. And they had to nail it together?

A. That is right.

Q. In order to do this work they would have to be on top of the hatch covers, wouldn't they?

A. Yes, sir.

Q. Did you see the men doing that work as you went around, did you see them working there on the hatch covers?

A. Yes, sir, I seen them.

(159) Q. Now, you say there were three of the hatch boards on the main deck which were wedged up?

A. Yes, sir.

Q. When you got those three on either side, is that right?

A. That is right.

Q. Now, they left down enough light into the tween deck so that you could see to do this work of constructing this shifting board, couldn't you?

A. There was light, but not good light.

Q. You could see to do it?

A. You could see.

Q. I mean you could see good enough to go over in the wings, and cut lumber, and saw it, and bring it back?

A. That was all you could do there, that is right.

Q. That is all you had to do, wasn't it?

A. That is right.

Q. And when it is threatening weather such as you say it was this day the opening up of that number of hatch boards is the usual procedure, isn't it?

A. That is right.

Q. And it gives in enough light to do the work which you have to do, doesn't it?

A. Just at the forward end.

• • •

(160) Q. Now, these lights, you had those in order to work in the after end of the hold, didn't you?

A. That is right.

Q. Because back there the feeder shut out the light——

A. Yes.

Q. —whether the hatch covers were on or off, didn't it?

A. That is right.

• • •

(162) By Mr. Alspach:

Q. I don't think I remember asking you this, but I wanted to get it straight. There was no one down in the hold during the time you were working there except Haenn employees. That is correct, isn't it?

A. Will you repeat that question, please?

Q. Isn't it correct that there was no one down in number 4 tween deck during the time that Haenn Ship Ceiling people were working there except the Haenn employees?

A. That is right, nobody else was down there, when we got down nobody else was down.

• • •

Re-Direct Examination:

By Mr. Landy:

Q. Mr. Skalicky, when you came down into the tween deck of number 4 the first time was there grain dust at that time on the deck and hatch boards?

A. Yes, there was grain dust.

Q. That was before the men started to chop out the feeder?

A. That is right.

Q. Was that the normal amount of grain dust you would find?

MR. ALSPACH: I object to that question, if Your Honor please, what the normal amount is.

(163) By MR. LANDY:

Q. Was that the usual amount?

MR. ALSPACH: I object to that as well.

A. Well, you see, when they pour grain in a ship——

MR. LANDY: Just a second.

MR. ALSPACH: Wait until His Honor rules.

MR. LANDY: The reason for the question was because of Mr. Alspach's cross-examination with respect to the unusual condition, that was all.

MR. ALSPACH: He said there was nothing unusual.

MR. LANDY: All we are asking is the specific item, rather than the general one.

By THE COURT:

Q. When you say there was nothing unusual down there, what does that take into account?

A. What do you mean, unusual conditions?

Q. Yes.

A. Well, I take on account of that, like the man said, there was nobody drinking or something out of the way. That is what I took it for.

Q. Aside from the men, was the condition of the tween deck itself, or the hatch covers in the tween deck—after all, when dropping in a hundred tons of grain, what would be the situation with respect to the grain dust and the grain itself (164) that you would get on the hatch covers on the decks?

A. Yes, that is a lot of grain and grain dust.

Q. Would there be an unusual or the usual amount when you entered the deck?

A. Well, we go on a ship before they pour grain, there is grain dust and grain there, but after they start pouring grain again, and all that dust starts coming up there and stays on the decks.

Q. What was the situation when you went down in the tween deck this morning?

A. There was a lot of grain dust.

Q. Usual or unusual in amount?

A. I can't get you on that question, what do you mean by that?

MR. LANDY: I am sorry, I can not hear his answer.

THE COURT: He said he could not get me on that question.

THE WITNESS: You mean amount?

THE COURT: Yes.

THE WITNESS: Oh, I couldn't tell you how much amount there was down there, see, but there was grain dust and grain down there, all over the decks and the hatch covers, but I couldn't tell you the amount.

THE COURT: Do you want to pursue it from there?

(165) By MR. LANDY:

Q. Was the amount of grain which you found when you came down the first time, that was lying on the decks and on the hatch boards—was that the same amount of grain that you would find when you come down into a hold in which there had been no grain poured?

A. No, this was a little more.

Q. Did you give any of your men any orders to remove any hatch boards on the tween deck?

A. No, sir.

Q. Do you know of any reason that your men would have had to remove the hatch boards on the tween deck?

MR. ALSPACH: I object to that, if Your Honor please.

THE WITNESS: No, sir.

MR. LANDY: This man was the foreman of this group.

MR. ALSPACH: He can not read other men's minds to find out their reasons.

MR. LANDY: He knows what has to be done and they are taking his orders.

THE COURT: Well, isn't there any other way of handling that? He gave no orders to remove any? Were any removed by his men?

(166) By THE COURT:

Q. Do you know whether or not your men removed any?

A. No, sir.

By MR. LANDY:

Q. Before the accident occurred was any of the work that was being performed—did that require the removal of hatch boards by your men?

A. No, sir.

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(171) RAYMOND HORCHUCK, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. LANDY:

Q. Mr. Horchuck, what is your occupation?

A. Ship's carpenter.

* * *

Q. And who were you working for November 16, 1947?

A. Working for Haenn.

Q. That is the Haenn Ship Ceiling and Refitting Corporation?

A. Yes, sir.

Q. Were you aboard on the day when Mr. Hawn suffered an accident?

A. I was.

(172) Q. In whose gang?

A. Steve Skalicky's gang.

* * *

Q. When you got to No. 4 main deck what was the condition (173) of the hatch covers?

A. They was all on, the tarpaulin was all closed up when we got there.

Q. What, if anything, did Haenn's Company men do?

A. When we got there we lifted the hatches up and put the chock in, because it was drizzling; that is, an 8-inch chock that they use to batten down the hatches, we put that on the hatch so that we could get light and air.

Q. Where did you take the hatch covers?

A. It was threatening weather, it looked rainy—it was like drizzling and raining, and we don't take those off in that kind of weather.

Q. Were there any hatch boards removed from the main deck?

A. The only one that was removed, as you get down the ladder that one was turned over—it was turned over.

Q. That would be forward?

A. The forward center of the hatch.

Q. In the center of it?

A. That is right.

Q. And did you go down when the men went down?

A. I did.

* * *

(174) Q. When you got down there, the minute you got down there, were the hatch boards off No. 4 tween deck?

A. I don't remember about the hatches—they were on as far as I could see.

Q. And what did you step on?

A. The hatches—I stepped on the hatch.

Q. Did you see any hatch boards up?

A. I did not.

Q. Did anybody tell you there were any off?

A. No, they didn't.

Q. What was the condition of the deck and the hatches at that time?

A. When we got down there, I remember it was dusty, like grain thrown around the hatch, and you had to be very careful.

Q. What does grain do when it is on the deck?

A. It is slippery, you slide on it, and you got to be careful how you walk on the hatches when grain is on there.

Q. Did you see any artificial light down there?

A. I remember seeing a small light in the after bulkhead, like, shining toward us as we were coming down the ladder.

Q. Was there any other kind of light?

A. No, that is all, the only light was from these hatches (175) that we propped up.

Q. What kind of light did that provide?

A. Just about—you could see enough—enough vision so that you could see—you know, to see one another, that's about all.

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(179) CROSS-EXAMINATION.

By MR. ALSPACH:

Q. Who called you to go in No. 4?

A. Steve Skalicky, our hatch boss.

Q. He is boss for the Haenn Ship Ceiling and Refitting Corporation?

A. Yes, he was the one who hired me.

Q. During the time you were down in No. 4 tween deck on the day of the accident, there was no one except Haenn employees down there?

A. As far as I know, yes.

• • •

(183) Q. At that time before this accident actually happened, you didn't look to see what hatch boards were on on the entire tween deck space?

A. No, I didn't. Of course, I was working in the square, under the hatches.

Q. You can't say today that they were or were not on when you first went down there, can you?

A. That is right.

Q. As far as you know, was anyone asked to get any lights up?

(184) A. What was that?

Q. As far as you know, was there anyone asked to get lights—by the way, the Haenn men were the only ones down there?

A. That is all I remember—except Steve Skalicky.

Q. Except Steve Skalicky?

A. That is all I remember.

Q. You didn't see Steve ask for lights?

A. No, I didn't see—I heard him mention about lights.

Q. You heard the other Haenn men ask Steve to get some more lights?

A. I remember he asked one man to get some lights, that is all.

Q. You don't know what happened after that?

A. No, I don't; I don't know if he got the lights or not.

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(186) SALVATORE SCIALABBA, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. LANDY:

Q. Mr. Scialabba, what is your occupation?

(187) A. Ship carpenter.

Q. How long have you been ship carpenter?

A. Six or seven years.

Q. Who do you work for?

A. George Haenn.

Q. Did you work for him on November 16, 1947?

A. Yes.

Q. Were you aboard the vessel when Captain Hawn was hurt?

A. Yes.

Q. Whose gang were you in?

A. Steve.

Q. That is Steve Skalicky?

A. Steve Skalicky.

• • •

(188) Q. When you got to No. 4, what was the condition of the main deck hatch cover?

A. They were covered with tarpaulin.

Q. What, if anything, did Haenn Company men do?

A. We had to pull the tarpaulin back and raise the hatch on end.

Q. How did you raise it?

A. Put a wedge underneath the board.

Q. How many boards did you so wedge?

A. Two of them, one on each side.

Q. One on each side?

A. Yes.

Q. Take out any boards?

A. Just one, and turned it across the other.

Q. That would be the forward end?

A. In the middle of the ship.

Q. And did you go into No. 4?

A. Yes.

(189) Q. Down the ladder at the forward end?

A. Yes.

Q. What did you step on when you got to the foot of the ladder?

A. The deck, the steel deck.

Q. And how many steps did you take before you get to the hatch board?

A. One or two more, and you are on the hatch covers.

Q. Were the hatch boards on the tween deck on or off when you got there?

A. As far as I could see, they were on.

Q. Did anybody tell you that any were off?

A. No.

Q. Did you see any off?

A. No.

Q. What was the condition of the deck and the hatch boards?

A. Slippery, with grain and grain dust.

Q. What was the condition of the lighting there?

A. Poor.

Q. Was there any artificial lighting down there?

A. No, sir.

• • •

(191) Q. Did you see Captain Hawn fall?

A. No.

Q. What was the first you knew of the accident?

A. I heard somebody say, "Cap fell down the hold".

Q. Do you know what time elapsed between the time you heard him talking to Horchuck about the cleat and the time you heard him falling?

A. I don't think it was more than two minutes.

Q. What, if anything, did you do as soon as you heard that?

A. I went to look to see where he could have fell.

Q. And did you find him?

A. Yes, sir.

Q. And where did you find him?

A. In the opening in the second centers of the shifting board.

(192) Q. When you say the second centers, is that the section closest to the feeder?

A. Right next to it.

• • •

Q. From the time you were down in No. 4 tween deck, from the time you first went down until the accident, did you see any of the Haenn Company touch any hatch boards?

(193) A. No, sir.

CROSS-EXAMINATION.

By MR. ALSPACH:

Q. During the time you were in the No. 4 tween deck on the day of the accident, was there anyone except the Haenn Ship Ceiling and Refitting Corporation there?

A. That is right.

Q. You took your orders from Steve Skalicky?

A. Yes.

Q. After you realized that Captain Hawn had had an accident, how far were you standing from the hold where the hatch board was out?

A. I would say about four feet.

Q. There was no doubt in your mind that you saw that one hatch board missing?

A. Yes, sir.

Q. And then you actually looked down through that opening to the lower hold?

A. That is right.

Q. And you saw Captain Hawn down there?

A. Yes, sir.

Q. Where did the light come from by which you could see that?

(194) A. From what little light we had.

Q. What little light you had?

A. Yes.

Q. That is about 24 feet below the level of the tween deck?

A. That is right.

Q. And you could see Mr. Hawn down there?

A. Yes, sir.

Q. Would you say for certainty that all of the tween deck hatch boards were in place when you first went in No. 4?

A. No.

* * *

(280) GEORGE E. TONER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

* * *

(281) By MR. LANDY:

Q. Mr. Toner, what is your occupation?

A. Stevedoring supervisor.

Q. By whom are you now employed?

(282) A. I am not employed at present.

Q. How long have you been a supervising stevedoring foreman?

A. Over forty years.

* * *

Q. Were you in court, Mr. Toner, when Mr. Joseph Budd, the stevedore foreman, testified last week?

A. Yes, sir, I was.

Q. You heard his entire testimony?

A. Yes, I did.

Q. Will you tell us what the duties of a supervising foreman are, Mr. Toner?

A. Well, to be in attendance on the ship at all times while she is loading, to lay out her cargo, and to see that the various steps are carried out to load the ship efficiently, so that she is fully loaded in a seaworthy manner to proceed to her destination.

(283) Q. In that connection does your work encompass the loading of grain ships?

A. Yes, sir.

Q. Have you yourself personally attended loading of grain ships?

A. Yes, sir.

Q. In the Port of Philadelphia?

A. Well, quite a number.

* * *

Q. Mr. Toner, in your experience, that is, from your experience as a supervising stevedoring foreman, was the

method which Mr. Budd testified that he used to strip the main deck hatch covers of number 4 on November 16, 1947, namely, the (284) taking off of the center hatch boards directly over the feeder, and two rows on each side, making five rows running from port to starboard, and four rows of hatch boards running from the after end of the hatch to the forward end, one row being beyond the limits of the feeder, and the other being within the limits of the feeder, in a day in which, in accordance with the testimony, it was cloudy and threatening—is that the normal and proper method of stripping that hatch for the purpose of loading grain?

A. Yes, it was, for the purpose of loading grain, to afford any protection, or as much protection as possible to the grain itself, either in the hold or on the decks.

Q. You also heard, or did you hear, Mr. Toner, that Mr. Budd testified that he took off one row beyond the limits of the feeder?

A. Yes, I heard that.

Q. Was that a normal and proper procedure?

A. Yes, sir, wherever possible you try to afford as much protection as you can when the weather is threatening.

Q. What would be the reason for removing that row of hatch boards beyond the limits of the feeder?

A. Well, at all times you can't get the grain all in the feeder, I mean there are obstructions. First, the center line shifting boards in the feeder are an obstruction, and if the (285) pipe which is usually placed over the hatch continues to run grain steadily there is some spillage, the grain is lively, and when it hits the board it will bounce. That affords the grain more protection by giving it access into the tween deck, to keep it off the main decks, because when it hits the main deck, when it is wet, it is spoiled.

Q. From your experience, Mr. Toner, as a supervising stevedoring foreman, when the stevedores who have been loading grain are given orders to knock off loading and

cover up hatches, because work—some kind of work is to be performed in that hold—is it the normal, customary procedure then for the stevedores to do anything in connection with the cleaning of the tween deck, or lower deck, or anything else?

A. No.

* * *

(288) THEODORE KNOPF, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. LANDY:

Q. Mr. Knopf, what is your occupation?

A. General superintendent, Haenn Ship Ceiling & Refitting Corporation.

Q. How long have you been general superintendent?

A. Ten or twelve years.

Q. What are your duties in connection with that position?

A. The operation of the firm.

Q. Are you acquainted with the custom and procedure of (289) ship's carpenters——

A. Yes, sir.

Q. —in connection with their work aboard vessels?

A. Yes, sir.

Q. Mr. Knopf, in your experience, or from your experience, is it the obligation or duty of ship's carpenters who come aboard the vessel, before they engage in any work in a particular hold, that they clean that hold?

A. No, we are not cleaners, we are only carpenters.

Q. Mr. Knopf, also from your experience, do ship's carpenters bring lights aboard with them as part of their regular equipment?

A. No, they usually get them always off the ship.

MR. LANDY: Cross-examine.

CROSS-EXAMINATION.

By MR. ALSPACH:

Q. Mr. Knopf, in connection with the furnishing of lights, do you have any lights of your own?

A. No, we don't have them.

Q. When you get them where do you get them? I mean if you as the contractor want lights, do you have sources of supply where you can get them?

A. If we want them we can always borrow them.

Q. From where?

(290) A. Stevedoring outfits or cleaning outfits in Philadelphia.

Q. Now, very frequently the stevedores go aboard the ship before the cleaners have been aboard, don't they?

A. That is right.

Q. Therefore, carpenters regularly and customarily go aboard grain ships that have not as yet been cleaned, isn't that right?

MR. LANDY: That is objected to, Your Honor.

THE COURT: Sustained.

By MR. ALSPACH:

Q. Have you been on a great number of grain ships, Mr. Knopf?

A. Oh, hundreds and hundreds of them.

Q. Grain ships by and large have a lot of grain dust lying around, don't they?

A. All the time.

* * *

(291) CHARLES HAWN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. LANDY:

• • •

Q. You are the plaintiff in this case, Mr. Hawn?

(292) A. Yes, sir.

• • •

Q. How old are you, Mr. Hawn?

A. I am 58.

• • •

Q. What is your occupation?

A. Ship carpenter.

Q. How long have you been a ship carpenter?

A. Ever since I have been 17.

Q. On November 16, 1947, were you employed as a ship's carpenter?

A. Yes, sir.

Q. By whom?

A. By George Haenn.

Q. That is the Haenn Ship Ceiling & Refitting Corporation?

A. Haenn Ship Ceiling & Refitting Corporation.

(293) Q. How long were you employed by them?

A. For about seven years.

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Q. Do you recall November 16, 1947, Mr. Hawn?

A. Yes, sir.

Q. What time did you go to work that day?

A. Well, we first started at 7:30 at pier 98.

(294) Q. Where did you go to work?

A. Girard Point.

Q. Did you work aboard a vessel?

A. Yes, sir.

Q. What was the name of the ship?

A. The "John Dickinson."

Q. Were you a foreman that day?

A. Yes, sir.

Q. How many men in your gang?

A. I believe there was six.

* * *

Q. From whom did you get your orders that day?

A. From Freddie Knopf.

Q. Who is he?

A. He is the superintendent of the job.

(295) Q. An employee of the Haenn Company?

A. Yes, sir.

Q. What time did you go aboard the "John Dickinson" that day?

A. About eight o'clock in the morning.

Q. What was the condition of weather when you went to work?

A. Well, it wasn't—it was just like a mist in the air, it had been raining earlier in the morning.

Q. Where did you go to work first on board the "John Dickinson"?

A. Number 3 hatch.

Q. What did you do there?

A. Well, we cut out corners of the feeder, and we lowered the shifting plank, and made them solid.

THE COURT: You cut out the feeder and you lowered——

THE WITNESS: Yes, sir, there is a space in between the shifting plank that was made for grain, for bagging, and we made it solid for oats.

By MR. LANDY:

Q. How long did you work in number 3 hatch?

A. I guess around until half past two, quarter to three.

Q. Then what happened, if anything?

A. My boss called me up.

(296) Q. When you say your boss, you mean Mr. Knopf?

A. Mr. Knopf, yes, he called me up and asked me to take a few men and give him a hand in number 4 hatch.

Q. What did you do then?

A. I called four men up and then we went back aft in number 4 hatch.

Q. How did you go back to number 4, across the main deck?

A. Yes, sir.

• • •

Q. Mr. Hawn, when you went across the deck to go to number 4 were you able to observe the condition of the main deck hatch covers at number 4?

(297) A. Yes, sir.

Q. Will you describe it for us, please.

A. Well, they had a few up on the end like that (indicating), they were wedged, there was an eight-inch wedge under them, I think two on each side.

Q. When you say "on each side" do you mean port and starboard?

A. Two on the port and two on the starboard side.

Q. Did you see any hatch boards off?

A. I think there was one or two off at the ladder. I am not sure.

Q. Did you go down in the number 4 tween deck?

A. Yes, sir.

Q. How did you do that?

A. I went down through the escape hatch.

Q. Where is that located?

A. That is located at the lower end of the number 4, the after part.

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(300) Q. When you got down onto the number 4 tween deck what was the condition of light?

A. Well, there was no light there, aft you couldn't see a thing back where that ladder was, you couldn't see nothing.

Q. What was the condition of the deck?

A. Well, the deck forward was full of grain and dust—grain and grain dust.

Q. What kind of a footing did that give you?

A. Oh, very poor.

Q. What did you do as soon as you got down into number 4 tween deck?

(301) A. Well, I started two men on the after part, the starboard side, cutting the corner, and putting the wing shifting boards——

Q. On what side?

A. On the port side.

Q. Is that the inshore side?

A. Inshore, that is the port side.

Q. Is that the side on which the escape hatch opens up?

A. Yes, sir.

Q. You started two men working on the port feeder, is that right?

A. That is right.

Q. Then what did you do?

A. Then I went forward.

Q. And how did you go forward, alongside the feeder?

A. Well, up alongside the feeder, and I stopped and talked to the foreman that was previously working in the hatch.

Q. Is that Mr. Skalicky?

A. Yes.

Q. Steve?

A. Yes.

Q. And then what did you do?

A. Well, I asked him what had to be done.

He said you can look around and see what has to (302) be done.

So I took another man and went around on the other side, on the starboard side.

Q. How did you get from the port side forward of the tween deck to the starboard side forward of the tween deck?

A. Well, they have a manhole in the shifting plank.

Q. When you say "a manhole" what do you mean?

A. Well, it is an opening in the plank (indicating), about maybe 30, 35 inches wide, and about, well, close to three foot high.

Q. Where does that opening come out with respect and with relation to the ladder, and to the hatches of number 4?

A. It comes right up to the forward end.

Q. The forward end of what?

A. The forward end of your hatch coaming.

Q. The forward end of the hatch coaming?

A. Yes.

Q. Is the manhole on the hatches?

A. Well, it was partly on the hatches and partly on the steel.

Q. Did you walk through that manhole?

A. Yes.

Q. Did you have to walk over hatches to walk through that manhole?

A. Yes, sir.

(303) Q. Were the hatches on or off when you went through?

A. Well, the hatches were on.

Q. What did you do when you got through over on the starboard side?

A. I took a man over to see if the other corner was cut out, and it had been already started, and was pretty well cut out when I got there. Then I started a man on the tween deck shifting plank.

Q. Then what did you do?

A. Then I came around back—I came forward again and went right through the same manhole again.

Q. The same way you had gone through the first time?

A. Yes, sir.

Q. Now tell us what happened after you came through the manhole.

A. Well, I took two or three steps, I was taking a couple of steps and I heard a man driving a nail, and I happened to look up and I seen he was putting a cleat on.

Q. Let me ask you this, where were you at that particular moment?

A. I was standing on the hatch covers.

Q. On the forward end?

A. On the forward end, yes.

Q. Do you know how many rows of hatch covers there were (304) forward of the feeder?

A. I think two rows.

Q. And which row were you standing on?

A. On the first row.

Q. That would be the one closest to the forward coaming?

A. Right up against the forward coaming.

Q. You said that you took two or three steps out of the manhole?

A. Yes, sir.

Q. You were now on the port side of the ship?

A. Yes, sir.

Q. All right, now continue. You told us that you saw or heard a man nailing a cleat.

A. Yes, sir.

Q. Who was that man?

A. A fellow by the name of Horchuck.

Q. Go ahead.

A. I seen him put that cleat up, and I said to him: Ray, you are putting that cleat up wrong, turn it around.

And he hollered to me, all right. He had his back toward me. He said: I will turn it. And then I went to turn around, and I slipped and fell, and that is all I know.

Q. When you say, you went to turn around, what do you mean?

A. Well, I was going to turn around, to look around the ship (305) and see what had to be done yet.

Q. Did you take any steps?

A. No, sir.

Q. What did you slip on, if you know?

A. Grain.

Q. How do you know it was grain?

A. Well, you can feel grain under your feet.

Q. Do you remember sliding across the hatch boards?

A. No, sir.

Q. The last thing you remember is just slipping?

A. Yes, sir.

Q. What is the next thing you remember?

A. Well, when I was in the hospital going up in the elevator.

Q. Mr. Hawn, how much time elapsed from the time you came down into number 4 tween deck and the time of your accident?

A. No more than three to five minutes.

Q. Did anybody tell you before you went down that there were any hatch boards missing out of the number 4 tween deck?

A. No, sir.

Q. Did anybody tell you at any time that you were down there that there were any hatch boards missing?

A. No, sir.

Q. When you went for the first time from the port side of the ship to the starboard side of the ship through the manhole, (306) what section of hatch covers did you walk on then?

A. I left the foreman——

Q. No, all I am asking you is what section of the hatch covers did you walk on as you went through the manhole.

A. The very first section.

Q. Would that be the forward section?

A. Yes, sir.

Q. The same section on which you were standing when the accident happened?

A. Yes, sir.

Q. And when you came through the manhole what section were you walking on, I mean from the starboard back to the port.

A. On the first section.

Q. Incidentally, Mr. Hawn, what is the distance between the tween deck and the lower hold?

A. Well, from the top of the beam to the deck it would run about 25 feet 6 inches.

Q. Incidentally, what is the distance between the main deck of number 4 and the tween deck?

A. Well, that would run about 12 feet from hatch to hatch.

Q. What was the condition of light at the forward end on the number 4 tween deck?

A. Well, that was very poor.

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(318) CROSS-EXAMINATION.

By MR. ALSPACH:

Q. Mr. Hawn, did you say that you started to work at number 3 hatch when you came aboard the ship?

A. Yes, sir.

Q. You were boss there?

A. Yes, sir.

Q. And your overall boss was Freddie Knopf, he was the ship boss, wasn't he?

(319) A. That is right.

Q. When you went to number 3 hatch what was the condition of the main deck hatch boards there?

A. They were all on, the tarpaulins battened down.

Q. Did you give your men any instructions what to do with those hatch boards?

A. Yes, sir.

Q. What did you have them do?

A. I told them to turn the tarpaulins back and lift every other hatch off and lay on top of the one that is on.

Q. What was your purpose in telling them to do that?

A. Well, so you could get light.

Q. About how many hatch boards were there in each strip?

A. Well, I don't know. There may be eight, sometimes there are nine.

Q. Either eight or nine?

A. Either eight or nine, yes.

Q. And those hatch boards are of what dimension, each hatch board?

A. Well, they run about thirty inches wide, and five feet long.

Q. And then you had your men place one hatch board on top of its neighbor, right across that strip, didn't you?

A. That is right, yes.

(320) Q. On how many strips of hatch boards did you have them do that?

A. One section.

Q. And was that the forward section?

A. The forward section, yes.

Q. Was your work going to be particularly in the forward section?

A. Yes.

Q. Did you thereafter go down to the number 3 and do some work there?

A. Yes, sir.

Q. Were you working in the forward section?

A. I was working in the forward section, yes.

* * *

(321) Q. While you were working at number 3 you did not get any rain on you, did you?

A. No, sir, it was misty, but it wasn't raining hard enough that you had to close right up tight.

Q. Who was it told you that you had to go back to number 4?

A. Freddie Knopf, our foreman.

* * *

Q. And after you went down the escape hatch in number 4—which by the way is at the after end, isn't it?

A. Yes.

Q. Now, isn't this a fact, Mr. Hawn, that on the after end you can't get any daylight through the hatch covers, can you?

A. No, sir.

Q. The feeder box in the after end takes up the whole hatch square, doesn't it?

A. Not the whole hatch square, all with the exception of a couple of beams.

Q. I am speaking of the after end.

A. The after end, yes.

(322) Q. The after end goes right up to the feeder in there?

A. Yes, sir.

Q. And the sides go up to the coaming?

A. Yes, sir.

Q. Therefore, when you are down in the after end all you have above is a solid steel deck, isn't it?

A. Yes, sir.

Q. Now, in the forward end, in the forward end of the feeder box, how many rows of hatch covers are there on the main deck forward of the feeder box?

A. I believe there were either two or three sections of hatchs on top, I am not sure.

Q. Those are directly above the tween deck hatch, aren't they?

A. Yes, sir.

* * *

(323) Q. Where was Horchuck working?

A. Well, I thought at the time—I said before that he was working in the forward end of the ship underneath the deck, but I heard him testify here that he was underneath—out in the hatch up against the hatch feeder.

(324) Q. Are you certain now where Horchuck was?

A. Well, to the best of my recollection he was underneath the deck.

Q. He was underneath the deck?

A. Yes.

Q. In other words, he was forward of the hatch then, is that right?

A. Yes, sir.

Q. And underneath the steel deck?

A. Yes, sir.

Q. Now, you looked in Horchuck's direction, is that it?

A. Yes, sir.

Q. Was it his hammering that directed your attention?

A. Yes, sir.

Q. What was it that he was nailing?

A. He was nailing a cleat on.

Q. And how big was that cleat?

A. Well, the general run of cleats, that is, for shoring, that is about eight inches.

Q. Eight by what?

A. Two by eight by four.

Q. Do you mean a piece of two by four eight inches long?

A. A piece of plank cut off, a ten-inch plank, they cut them off and split them down. They generally cut them about (325) ten inches long.

Q. What would be the overall dimensions?

A. About ten inches.

Q. Ten by two by four?

A. Yes, sir.

Q. And did you say that you saw that he was putting that cleat on the wrong way?

A. Yes, sir.

Q. About how far away from you was Horchuck?

A. Not very far, about eight feet.

Q. About eight feet?

A. Yes, sir.

Q. And it was darker where Horchuck was than where you were, wasn't it?

A. Yes, sir.

Q. I believe you said that you turned on your heel, is that right?

A. Yes, sir.

Q. You just pivoted?

A. Just went to turn around.

Q. Did you say once that you had an awful habit of turning on your heel?

A. I had. I did.

Q. What caused you to say that it was an awful habit?

(326) A. Well, you see, when you work long on ships, if a man hollers, so you look out, and turn quick, you generally turn on your heel, or on the sole of your foot, you make a quick turn to see what is happening.

Q. And was that what you did on this day?

A. Yes, I just turned around on one foot. I don't know which one, but I turned around on one foot.

Q. And when you turned around you were going to go in the opposite direction from where Horchuck was?

A. My intention was, when I was on the other side, was to go back aft on the port side, and when I stopped I talked to Horchuck about the cleat.

Q. But in any event you were facing Horchuck and then you turned around in the opposite direction, isn't that right?

A. Yes.

MR. LANDY: Not the opposite direction.

MR. ALSPACH: He just said, yes.

By MR. ALSPACH:

Q. That is what I am trying to get at, Mr. Hawn, you were facing Horchuck?

A. He had his back toward me.

Q. You were looking toward his back?

A. Yes, sir.

Q. And then you went to turn around?

(327) A. I went to turn around.

Q. And it was after that that you said you slipped?

A. Yes, sir.

Q. Now, where you were standing you could see the hatch covers, couldn't you?

A. I could see the one I was on.

Q. How far away were you from the centerline of the shifting board?

A. That I couldn't tell you.

Q. You haven't any present recollection at all?

A. No, just as far as you could take two or three steps, that is all.

Q. How far away were you from the ladder that comes down the forward end?

A. Well, that I don't know either. The ladder comes down on part of the steel deck, it comes down on the steel deck alongside the tanks.

Q. Does the ladder come down right about where the shifting board is?

A. Yes, sir.

Q. The centerline?

A. Yes, sir, right alongside of it.

Q. I believe you said that there were two hatch boards off at the forward ladder, that is right, isn't it?

(328) A. I didn't say two, I said there might have been one or two, I don't know for sure.

MR. LANDY: Are you speaking of the main deck, Mr. Alspach?

MR. ALSPACH: Yes, that is right. Yes, I am referring to the main deck now.

THE WITNESS: Yes, I know.

By MR. ALSPACH:

Q. And the main deck then was about how high above your head, Mr. Hawn?

A. Well, from the hatch cover I was standing up to the next hatch cover would be about twelve feet.

Q. Before you went to turn around you did not look to see what was behind you, did you?

A. No, I was just looking at Horchuck. When I came out of the manhole I looked at Horchuck.

Q. And then you turned around?

A. Yes, sir.

Q. But you didn't look before you turned around, did you?

A. No, sir.

• • •

(332) Q. When you left number 3 hatch, where you started to work that morning, did you replace those main deck hatch covers that you had there?

A. No, sir.

Q. You just left them staggered one on top of its neighbor?

A. Yes, sir.

Q. And at number 3 those hatch boards that were off in that manner gave you plenty of light in the forward part of the hatch square, didn't they?

A. Yes, sir, that is a small hatch.

Q. Yes. There were two strips there, weren't there, forward of the feeder box in the tween deck?

A. No, I think there was only one strip there.

Q. In any event, you were working underneath those openings, weren't you?

A. Yes, sir.

Q. And those openings gave you plenty of light there?

(333) A. Yes, sir.

• • •

By Mr. Mount:

• • •

(334) Had you been on grain ships before?

A. Yes, sir, thousands of them.

• • •

(341) Q. You say it was overcast and misty this day, is that right?

A. Yes, sir.

Q. Have you worked on grain ships in similar weather before?

A. Yes, sir.

Q. And it is customary in that kind of weather not to take all of the top hatch boards off, isn't it?

A. Yes, sir.

Q. And it is customary to wedge them up, as they were done in this case, isn't it?

A. Yes, sir, that is, if you can't get no artificial light.

Q. Well, the light that came in through the hatch board that was off in the center of the hatch, and the two that were up on both ends, that gave you light enough to see, didn't it?

A. Well, none too good, no, sir.

Q. But you could see where you were going?

A. Oh, I could see where I was walking, yes.

(344) Q. Did you see any hatch covers off in the tween deck when you came through the manhole?

A. No, sir.

Q. Which way did you look when you came through the manhole?

A. When you come through your head is down, you can look right ahead of you.

Mr. Mount: That is all.

By Mr. Alepach:

(345) Q. Mr. Hawn, can I ask you one more question, please?

A. Yes.

Q. These hatch covers, when they are all in place, form a solid floor, don't they?

A. Yes, sir.

Q. And all of the hatch boards are of a standard size, are they not?

A. Well, practically, on liberty ships, they generally run the same.

Q. All except, I think, the four corners, which are a little bit different, aren't they?

A. Yes, they are rounded.

Q. But the rest of the hatch boards are of a standard size, that is correct, isn't it?

A. Yes, sir.

Q. And the tween deck and the main deck hatch boards are of the same size, aren't they?

A. Yes, sir.

* * *

RE-DIRECT EXAMINATION.

By MR. LANDY:

* * *

(346) Q. One other question, Mr. Hawn.

A. Yes.

Q. The amount of grain which you found on the deck and the hatch boards of the "John Dickinson" on November 16, 1947, was that amount the general amount of grain you find on a grain ship that you worked on prior to that time, or any grain ship that you worked on prior to that time?

A. No, sir.

MR. ALSPACH: That is objected to, if Your Honor please, as being too general.

MR. LANDY: I will follow it up by asking him whether it was more or less.

THE COURT: Usual or unusual. Was it an unusual amount? That certainly I think is clear.

MR. LANDY: I am speaking now of the tween deck.

THE WITNESS: Yes.

By THE COURT:

Q. Did you find that morning an unusual amount of grain on the tween deck?

A. Yes, sir.

Q. And hatch covers?
(347) A. Yes, sir.

• • •

(381) MR. LANDY: May we state for the record, Your Honor that it has been stipulated between counsel that the amount of the medical bill in connection with medical services rendered to Mr. Hawn from the date of the accident up to the present time is $836.15.

With the exception, Your Honor, of a portion of (382) the pleadings which I think can be entered without the presence of the jury, and of the exhibits to be offered into evidence, that is the plaintiff's case, sir.

• • •

(383) MR. ALSPACH: I move to strike the testimony of the witness Knopf in so far as it pertained to a custom of securing lights from ship's personnel. That expert testimony has not been followed up by evidence of any of the witnesses to the effect that that was done upon the day in question. Inasmuch as it has not been followed up, I submit that it is not properly in evidence.

MR. LANDY: May I say in that connection, Your Honor, that the testimony of the foreman, Steve Skalicky, was (384) originally that he had asked a member of the crew and an officer, and we had discussion concerning the identification of that individual, and I was satisfied that from his own attempt to identify, that he didn't identify an officer or a member of the crew.

THE COURT: That is right; yes.

MR. LANDY: However, in so far as he asked somebody aboard the vessel, and in so far as the light was subsequently furnished, it was lowered, and that light and its condition were specifically testified to and in so far as the stevedores, they did not go into that hold after the accident—I mean after they closed up

—and the Haenn Ship did not bring in their own light, I think that is perfect groundwork—perfect groundwork has been laid to infer that the light that was sent down was sent down by the ship.

These lights are customarily, as the expert testified, supplied by the ship; a person was asked; the light was supplied; and I think from that the jury is allowed to draw the inference that that light was given to them by the ship.

MR. ALSPACH: May I say a word, Your Honor?

THE COURT: Yes, sir.

MR. ALSPACH: As I recall, Mr. Landy himself agreed that any reference to an officer or member of the crew (385) in connection with that light could be stricken out. That leaves the record barren of any evidence whatever that anyone connected with the ship——

MR. LANDY: No, no.

THE COURT: No, I don't think he did that. What he did, Mr. Alspach, was withdraw any attempt to further have this man identify the person.

MR. LANDY: That is correct, Your Honor.

THE COURT: As a member of the ship's crew or an officer.

MR. LANDY: That is correct, sir.

MR. ALSPACH: All we have is that a man with khaki pants, not wearing any cap, was asked for lights.

THE COURT: No, I think you have two other things in the case that I think you overlook. You have, first, the testimony of the colored man who was the foreman for——

MR. LANDY: Atlantic & Gulf.

THE COURT: —the stevedores. You have him, where he went to the officer and got the cluster lights.

MR. LANDY: They were the Roberts Cleaners.

THE COURT: They were the Roberts Cleaners, but the day before——

MR. LANDY: And the day of the accident both.

THE COURT: I don't believe so.

(386) MR. LANDY: Oh, yes.

THE COURT: He said there were either four or five bulbs in that cluster of lights.

MR. LANDY: And they were given four of those cluster lights on each day, Your Honor.

THE COURT: Yes, I think there is enough for the jury, Mr. Alspach, to say whether or not that was the ship. Under the evidence of the expert whether or not —if you can show, of course, that it is not the custom, you have that right to show it is not the custom; but they have shown that it is the custom to obtain the lights, and I think that is a fair presumption. It is not stretching it too far. There is a single inference to be drawn from that, and that is whether the person was a member of the crew who gave them the lights.

MR. ALSPACH: Under their own evidence, a portion of the logbook which they read into the record, there were about 80 people working aboard the ship that day. Under those circumstances, asking a man in khaki pants for lights, and thereafter the lights appearing down in the hold, of unknown origin——

THE COURT: Oh, I think we must certainly agree that a man would have to be a wizard, be familiar with the ship, or be a member of the crew to go and get the light and lower it into the hold.

(387) MR. ALSPACH: These fellows all have their lights.

MR. LANDY: There is no such testimony.

MR. ALSPACH: It is my purpose to show that.

MR. LANDY: There is no such testimony in the record, but quite the contrary, Roberts Cleaners used lights furnished by the ship; Haenn and Company did not bring lights on.

THE COURT: Knopf said they didn't even have them.

MR. ALSPACH: That is for us to argue.

THE COURT: They said they would be able to borrow some from the stevedore or the cleaner.

MR. ALSPACH: And they were brought that day.

THE COURT: But they never had any lights—he said he didn't have any at all.

MR. ALSPACH: But my point is, Your Honor, the cleaners and stevedores were also aboard the ship that day, and Knopf said, "We can borrow them from them."

MR. LAKATOS: They said they borrowed them from them.

MR. ALSPACH: Blasband said they used some of the ship's lights. You are forgetting the 80 men on this ship, and I say it is not our obligation.

(388) THE COURT: But the particular clusters that were actually borrowed, actually identified, were borrowed by the cleaners. There wasn't any question about that. And they got them from the ship's folks.

MR. ALSPACH: Yes.

THE COURT: There was no question about that.

MR. LANDY: And not only that, but the testimony is that the stevedores used no lights at all.

THE COURT: And there was just this one single light, as I remember, in the tween deck forward, and when you walked forward the light struck you in the eyes, he said.

MR. ALSPACH: Yes, Your Honor, the evidence was that after that light came down no one thereafter said anything about lights to anybody.

MR. LANDY: That is something else.

THE COURT: I think it might be better, if you are going to explore that—I would be prepared to overrule your objection; not grant the motion to strike that testimony; and let it go to the jury. I think I should, because I think the door is wide open for you to go ahead and prove to the contrary if it is not true.

MR. ALSPACH: All we can prove to the contrary is to produce the 80 men who were on the ship.

MR. LANDY: That is not necessary.

(389) THE COURT: No, you don't. You have to go on the theory that it is not the practice of the ship to furnish these lights. They are limited pretty clearly. You can not be hurt. If the situation is correct, certainly it speaks loudly that it would be a gross injustice to strike it. That is not a feeling I have about it; that is this, up here, that keeps telling me that all the time.

I had a feeling that that whole line of testimony could be stricken the other day. That was my first feeling about it. You remember that I even asked that fellow something, but when you examine it closely and analyze it, what Mr, Landy did was to withdraw from having that witness further identify the man.

MR. ALSPACH: Yes.

THE COURT: He could not do it. You can well argue to the jury just what you said, but you have got the other proposition confronting you, and that is the flat, affirmative statement that it is an affirmative duty or custom on the part of the ship to furnish the lights.

MR. ALSPACH: Your Honor, of course we will argue as a matter of law that there is no such duty, but on the

facts alone, we submit that a witness has not said so, and an expert can not prove the fact.

THE COURT: But there have been three witnesses (390) here who testified about the lights, and under that testimony there was the cluster of lights testified to by Budd, who was the very first witness, right at the sound of the gong, and there I was very much surprised the way he testified. He was the first I have seen so forward and direct. He impressed me a whole lot, that fellow. I don't think there is anything that you can do but submit that to the jury.

You may well argue, as you probably will, to the jury, "They went up to the man with the khaki pants. Who was he? They did not identify him." That may be; but when you do that, you are always emphasizing something else, and the particular thing here is that, whether through custom or law I am not prepared to say, but so far the evidence shows that it is at least custom for the ship to furnish those lights.

MR. ALSPACH: My only point now, Your Honor, is to contend that the custom can not establish that it was done that day. Whether or not it emphasizes any legal obligation on us, I think is something else which it may be premature to discuss.

THE COURT: That is right.

MR. ALSPACH: But my position is that the fact that it is customary to do it won't help them prove the fact that they did ask someone connected with the ship on that day.

THE COURT: Well, you had Budd's testimony about (391) the lights. You have the man who was in charge of the cleaners. What was his name?

MR. LANDY: Blasband.

THE COURT: Blasband. You had him. Then you had the man who testified—he said that a single light

was lowered down. He spoke to the men on the deck and a single light was lowered down into the hold, and that light apparently, definitely tied in—that light was apparently the light that was carried up forward and was thrown back facing the men who walked forward toward that grain feeder.

MR. LANDY: That is right.

THE COURT: The light came right into their faces. Now there is the situation; so I will overrule your motion to strike that testimony and grant you an exception.

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(393) MR. ALSPACH: I would like to present certain motions on the record at this time.

THE COURT: All right.

MR. ALSPACH: If Your Honor please, I move for a directed verdict on behalf of the defendant, Pope & Talbot, Incorporated, and my motion is based upon the contention that the plaintiff has not made out a case of liability against this defendant.

I will state very briefly, if Your Honor will (394) permit me, the reasons behind this. I submit, in the first place, that the plaintiff has offered no evidence as to the status of the injured man aboard this vessel. The plaintiff alleged in his complaint that he was aboard our ship pursuant to a contract entered into between Haenn Ship Ceiling Company and this defendant. Our answer to that was that we lacked information upon that point and demanded proof thereof, if material. Certainly any duty which we owed this plaintiff must arise by reason of his status aboard the ship. The record is completely barren of any suggestion of how he got aboard the ship, except that he was in the employ of Haenn Ship Ceiling & Refitting Corporation.

In the second place, Your Honor——

THE COURT: I think you are sort of splitting horse hairs there. He went on at the direction of his superintendent, Mr. Knopf——

MR. ALSPACH: Yes, Your Honor.

THE COURT:—who took the stand and said that his position was that of general manager and conductor of the entire business.

MR. ALSPACH: Yes, Your Honor.

THE COURT: Well now——

MR. ALSPACH: My contention is that there is no evidence whatever of the relationship of this defendant to the (395) Haenn Ship Ceiling & Refitting Corporation, and whatever duties we have in the premises must be judged according to our relationship, if any, to Haenn Ship Ceiling & Refitting Corporation.

THE COURT: There is sufficient there. The allegation of the complaint and your corresponding answer, in the fourth or fifth paragraph—I forget which at the moment—but certainly you said that the ship was under your operation, under a bare boat contract.

MR. ALSPACH: Yes, Your Honor. We admitted that we operated the ship under bare boat charter. My contention is that there is no relationship of the Haenn Company to this defendant, therefore there is no evidence of relationship of this plaintiff to the defendant. There is further nothing by which we can judge the measure of the duty, if any, which we owed to him.

THE COURT: I think it is perfectly clear that you were on there to fix the grain feeders, repair them, put them back into shape. I think that is all horn book.

MR. ALSPACH: Your Honor, the second ground of my motion is——

THE COURT: I will overrule that.

MR. ALSPACH: —that assuming that the plaintiff was aboard the vessel by reason of any contract or (396) understanding with us, which, of course, we deny, then there is no evidence of any breach of duty on our part. As I understand the evidence, it turns upon the presence of grain and grain dust and the lack of illumination. Those, I think, are the bases upon which liability is attempted to be founded—those, taken in connection with the condition of the hatch board, the missing hatch board at the time.

THE COURT: That is a very important factor.

MR. ALSPACH: Yes, Your Honor. There is no evidence whatever that any officer or any person connected with the ship had any knowledge whatever of the removal or the fact that that hatch board was not in place.

THE COURT: But that is your defense. Isn't that true? Isn't that your defense? What you are setting up to me by way of argument to me is your defense.

MR. ALSPACH: I think, Your Honor, it is a matter of affirmative proof. I think, in order to show any negligence on our part, they have to show that we had notice of it or had reason to know of it. I submit that the record is barren of any proof.

THE COURT: Isn't that for the jury?

MR. ALSPACH: I think there aren't any facts upon which the jury can find that we knew about it.

THE COURT: Have you examined carefully the (397) evidence that the plaintiff gave?

MR. ALSPACH: Yes, sir, Your Honor, I have.

THE COURT: And you say there is no evidence by which a jury can——

MR. ALSPACH: Yes, Your Honor.

THE COURT: All right.

MR. ALSPACH: Furthermore, I say that as far as the condition of grain dust is concerned, the evidence was that there was a little more than usual. That came from Skalicky, the foreman. And the evidence from the plaintiff himself is that it was an unusual amount of grain dust and grain in the hold there, and the plaintiff, of course, testified that he slipped. I think under those facts there is no clear evidence on which the jury can find what actually caused him to slip was the unusual condition or the usual condition, because they all testified that grain dust in and of itself is slippery.

THE COURT: That is right. All right; I will overrule it.

MR. ALSPACH: As far as the lights are concerned, Your Honor, I submit there is no evidence that anyone ever asked any officer or member of the crew of this vessel to furnish any lights. On the contrary, the evidence is that they asked this man in khaki pants, and after they made that (398) request the light was furnished to them.

THE COURT: No, the light was lowered down into the hold.

MR. ALSPACH: The light was lowered down into the hold on an extension cord.

THE COURT: Not furnished at all. It wasn't furnished at all; it was lowered down into the hold.

MR. ALSPACH: Well, I submit, Your Honor, that that is being furnished with a light. If Skalicky saw a man in khaki pants up on the deck and said he wanted some light down in the hold, certainly lowering the cargo cluster light down in the hold was furnishing a light, but the point is, after that one light was furnished, he himself, Skalicky, said that he never said anything after that to anybody about furnishing more light.

THE COURT: That is right.

MR. ALSPACH: I do not want to consume any more of our valuable time by arguing the motion.

THE COURT: All right; then I will overrule your motions and grant you an exception.

MR. ALSPACH: Thank you.

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(399) THE COURT: Members of the jury, I understand that one of your members has been caught by the weather and is somewhat indisposed and will be for the balance of the week. It is nothing serious; it is a touch of the grippe. Number 13, or the first alternate, will take the seat of number 5.

(The first alternate took the seat of Juror No. 5 and trial proceeded with thirteen jurors.)

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DEFENDANT'S EVIDENCE.

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(416) ROGER L. THORN, recalled.

(417) DIRECT EXAMINATION.

By MR. ALSPACH:

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Q. Captain, were you ever with the United States Army?

A. Yes, I was.

Q. When?

A. From approximately September, 1942, until June, 1949.

Q. And in what capacities did you serve with the army?

A. Well, the first six months it was a period of schooling, officer candidate school; and approximately March or April, 1943, I was sent to Philadelphia, and shortly after that was made the executive officer of the Water Division at Pier 98, and that continued until approximately October, 1945, and then I served for approximately three months in Baltimore at various jobs, and came back to Philadelphia in December, 1946, as officer in charge of the subsection of Transportation Section Headquarters, Second Army, here in Philadelphia.

Q. Now, as officer in charge of the subsection of the (418) Transportation Section of Philadelphia, what were your duties?

A. Well, primarily to supervise the transportation functions of the Second Army in this district, and as an additional duty, which later developed to be about ninety-five per cent of my principal duty, to act as supervisor for the operations that were performed here for the account of the New York port. In other words, the office really became the suboffice or subport of the New York Port of Embarkation, and in my capacity I provided the overall supervision and operation of that subport.

Q. What if anything did you have to do with the handling of grain ships?

A. Well, we provided the overall supervision of any operation in connection with grain ships for which the army was responsible, and that included, on various chartered ships, for instance a time chartered ship, the overall operation of the ship from the time that it came into the river until the time that it actually sailed; it included the procuring of all contractors' services in connection with the handling or loading or cargo, cleaning vessel holds, fitting the ship. It did not provide the supervision of the crew of the vessel nor the storing of the vessel or the bunkering of the vessel; that responsibility remained with the operator of the vessel; but in any cargo matters at all in connection with the army we provided the supervision.

(419) MR. LANDY: That is objected to, Your Honor, and I move that the answer be stricken as being too general and as having no applicability to this case, as yet, at all.

THE COURT: Let us wait and see.

By MR. ALSPACH:

Q. Captain, did you have an opportunity to look over the army file pertaining to the "John Dickinson", which has been brought into court here?

A. Yes, I did.

Q. And did looking over that file refresh your recollection as to the loading operation of that vessel?

A. Yes.

Q. Captain, can you tell us who procured the services of the Roberts Cleaning Company upon that occasion?

A. On the "John Dickinson", the army did.

Q. And who procured the services of the Atlantic & Gulf Stevedores?

A. The army did.

Q. And who procured the services of the Haenn Ship Ceiling & Refitting Corporation?

A. The army did.

Q. Now, Captain, prior to November of 1947, the occasion when the "John Dickinson" visited here, was there any procedure established between you, acting for the army, and the Roberts (420) Cleaning Company and the Haenn Ship Ceiling Company, and the Atlantic & Gulf Stevedores, with respect to whom those particular persons were to take their orders from when they did work for you?

MR. LANDY: Objected to.

MR. MOUNT: I object to that.

THE COURT: Yes; I will sustain that.

By THE COURT:

Q. Tell me this, Captain: When you say that the situation was such, as it existed between the various com-

panies and the army, did you make those contracts with the companies?

A. Yes, sir.

Q. You personally?

A. Yes, sir; that is, I——

Q. Did you contact the various officers of the company?

A. Yes, we did—those contracts were negotiated, with the exception of the stevedore contract; that was handled in New York. The contracts with the cleaning companies and with the ship ceiling company and various other contractors were negotiated by myself.

Q. With the ship ceiling company you negotiated that contract yourself?

A. Yes, sir; the contract was negotiated in so far as rates (421) were concerned, various charges such as what the army would be billed for—oh, such items as overtime difference, and all.

Q. But I mean, would you call up the Haehn Ship Company, for instance, Haenn Ship Ceiling & Refitting Company, and tell them that the "John Dickinson" was coming into port, would be docked at Pier 98, that you wanted them to go aboard and look over the grain fittings, repair them if necessary?

A. That is right, and prior to that time, Your Honor——

Q. Whom in the Haenn Ship did you talk to?

A. Mr. Wiedmann, usually, or Mr. Ted Knopf.

Q. And you negotiated all the rates and everything else?

A. Yes, sir; those were prior negotiations. In fact, before the rates were negotiated to a point where we came to an agreement with all the different companies what the rates, the charges, and the terms and conditions would be under which work would be performed, and from there on we merely would call those contractors and tell them to go to work, they performed their duties under, I might say, direct supervision; they were told how many men to bring

out; they were told what job to do, how that job was to be done, and of course they had—we had a signed agreement with them as to what their charges would be for those services.

Q. Then would you board the ship yourself to see what the situation was?

(422) A. Not always personally.

Q. Who told you what the situation was?

A. Well, I had representatives there. I had other officers that served under me, and also civilian cargo supervisors, such as Mr. Davis, who just testified.

Q. And did they tell you what the situation was on the ship?

A. Yes.

Q. Did your men take over on the ship?

A. Yes, they definitely did.

Q. What happened to the captain of the ship?

A. The captain of the ship was not concerned with the loading operations, only in so far as they affected the stability and the safety of the ship.

Q. Well, that is very important.

A. Yes, it is quite important, but his——

Q. After the captain leaves the port here, you are not going to be much help to him.

A. Well, his authority, Your Honor, did not exceed the authority of the inspector of the New York Board of Underwriters. In other words, there were certain——

Q. The New York underwriters merely told him how the fittings go for distribution of cargo; isn't that true?

A. No—well, yes, but that is all the further the captain's authority extended. As far as the distribution, the weight (423) distribution of the cargo, and whether the ship was in a safe and suitable condition to take to sea after the load was complete.

Q. Whose responsibility was that?

A. That was the captain's responsibility.

Q. Certainly it was the captain's responsibility, and the captain's responsibility for the maintenance of the ship is while it is in port, too?

A. Well, in so far as——

Q. I mean, is there any question about that?

A. As far as the loading of the cargo is concerned, there is; yes, sir, because this particular vessel was a time chartered vessel, and that vessel was chartered to the army, you might say, to do with as they will.

Q. For whom to do with as they will?

A. The army. The army was charterer of the vessel to load whatever cargo they wanted to put on there.

Q. That is all right.

A. And to load it whatever way they saw fit to load it, and the captain's responsibility only extended to the point where he had to take the ship to sea and he was interested in the safety of the vessel only; he was not concerned with the way the cargo was stowed, only in so far as it affected the stability of the ship, or the procedure of stowing, or who the contractors were, (424) or what cargo was loaded, or how fast or how slow it was loaded. In other words, his responsibility was, I would say, along the lines of the responsibility of the inspector for the New York Board of Underwriters.

Q. What you are telling us is that he did not care how long it took you to load the ship?

A. That is right.

Q. Because his shipowner was being paid for that?

A. Well, his——

Q. That is what you are telling us?

A. That is correct; yes, Your Honor.

Q. He did not care how long it took?

A. That is correct.

Q. But he did care about the manner in which the ship was being loaded?

A. Well——

Q. And what it was being loaded with?

A. Well, technically, he did, I suppose.

Q. It is a very practical matter, don't you think?

A. It should be; yes, sir. But from my own experience, why we did not experience too much difficulty with captains or the mate in the loading operations or in the stowage of the vessel. In other words, on a time chartered vessel, the vessel was turned over to the army to load cargo.

(425) Q. But for the purposes of loading the cargo only?

A. That is true. Only——

Q. For the purpose of loading the cargo, and your authority was limited right to that?

A. Yes; that is true.

Q. The running of the ship, the standing of watches aboard the ship, who was coming aboard the ship, and what not, were still under the control of the captain?

A. Yes, that is true.

THE COURT: All right.

MR. LANDY: Will Your Honor grant us an exception to the testimony of this witness so far?

THE COURT: All right.

By MR. ALSPACH:

Q. Captain, will you tell us whether there was a part of your understanding with these various independent contractors as to who they were to take orders from?

MR. LANDY: Objected to, sir.

THE COURT: Read that again.

(Question read by the reporter.)

MR. LANDY: If Your Honor please, there is testimony that there was a contract. The contract will speak for itself. If this record purports to be the entire record, the contract will be in here. No understanding would be (426) necessary.

MR. MOUNT: If the Court please, I further object for the reason that the question is too general—who they were to take their orders fro[illegible].

THE COURT: Orders about what?

MR. ALSPACH: I will make it specific.

By MR. ALSPACH:

Q. Captain, was it a part of the understanding between the army and these contractors as to how many men they were to send aboard a ship, and when they were to send them aboard?

MR. LANDY: Objected to.

THE WITNESS: Yes, sir.

THE COURT: He has testified to that. There was no objection made to it at that particular point other than the exception unless this gentleman's testimony was tied in—whether or not portions of it would be stricken.

Now he said, "Was there an understanding as to how many men would go aboard?"

This gentleman has already testified that that was one of their understandings; he would tell them how many men were to go aboard; but was that a written contract or an oral contract?

THE WITNESS: No, that was an oral contract, however, the rates and the various terms and conditions were (427) a written contract. It was not a written contract such as is usually drawn up between the army and another contractor; it was a letter from the various contractors. There were verbal negotiations between all the cleaning companies and all the ship ceiling companies, and these verbal negotiations were confirmed in letter by the contractors to the army, as to what they would do.

THE COURT: Do you have those letters?

MR. LANDY: At this point, Your Honor, may I ask, for the limited purpose of determining the propriety of this question, whether or not there is such a letter or contract of confirmation in this file? Do you want to look at it, Captain Thorn?

THE WITNESS: Is that a question? Well, without looking at it, I don't think there is; I am quite sure that there is not.

MR. LANDY: Under those circumstances I repeat my objection, sir. Certainly these contracts would speak for themselves, and the letters of confirmation even more so.

By THE COURT:

Q. Do you have a recollection of what your specific understanding was in this particular matter with the "John Dickinson" in November, 1947?

(428) A. Pertaining to what?

Q. When this accident happened.

A. Pertaining to the hiring of the contractors?

Q. Yes.

A. Yes; after going back over the file of the ship to refresh my memory, all of the contractors—that is, the stevedore——

MR. LANDY: May I object at this time, sir, to this testimony.

THE COURT: Yes, I will grant you an exception.

THE WITNESS: The stevedore, the carpenter, and the cleaners were all ordered by the army to proceed to work on this vessel.

By THE COURT:

Q. You say you would have that file?

A. Yes, sir; I did.

Q. And did you write those letters of confirmation?

A. There were no letters of confirmation.

Q. You mean this was an exception?

A. No, it was not an exception.

Q. You say there were always letters of confirmation?

A. These letters of confirmation, Your Honor, were not submitted on every ship. It was to cover a period of time, and it was done to expedite the matter. In other words, as these (429) various vessels came in, the contractors were on record with these letters of confirmation, with a letter of confirmation, concerning what their rates would be, an indefinite period of time, and all that was necessary to do after that was to order them to work, and we already had the letter of confirmation as to what their rates and conditions were going to be.

Q. You mean to say, if you told them to go ahead and put forty men aboard the "John Dickinson", docking at Pier 98, tomorrow morning at seven o'clock for the purpose of refitting or repairing some part of the ship, that you would not confirm that in writing?

A. We would. It was not always done, though. There was a confirmation that was sent out to the contractors—I don't recall whether it was done on this or not.

Q. Was it required? Were you required to do it?

A. I really don't know.

Q. You don't know whether you were required?

A. I don't know whether that is an actual requirement or not—at that time. I do know that it is now. And I do not recall seeing any such letters of confirmation in that file—that is, actually directing the contractor to proceed to work.

Q. So your statement is that you don't know whether or not it was a requirement at that time; you know it is a requirement now; but if it was the requirement at that time you did not (430) conform to it anyhow?

A. Well, I am not quite sure that it was not conformed to, Your Honor. I don't know whether those letters of confirmation are part of that file. At some subsequent date

I do know that such—that there is such a requirement that contractors must be notified in writing, and those letters were in the file. Whether they appear in the file as far back as this vessel, I don't know.

Q. Well, do you know whether or not you wrote such a letter?

A. Not on this particular vessel; I don't know.

Q. And you have examined the file to see whether or not there was such a letter there?

A. No, not for that purpose; no, sir. It was only to refresh my memory about the handling of the vessel.

THE COURT: All right.

* * *

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(432) WILLIAM A. TONER, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. ALSPACH:

Q. Mr. Toner, by whom are you employed?

(433) A. The Atlantic & Gulf Stevedores.

Q. How long have you been so employed?

A. Since December, 1942.

Q. And what is your position with Atlantic & Gulf Stevedores?

A. Port manager.

Q. Mr. Toner, did you at my request bring with you the file of Atlantic & Gulf Stevedores with respect to the loading on the "John Dickinson" in November of 1947?

A. Yes, sir.

Q. Can you tell us, Mr. Toner, who employed the Atlantic & Gulf Stevedores to work aboard that ship?

A. The United States Army.

Q. Can you tell us from whom you received your orders as to what loading was to be done?

A. From the Transportation Corps Office in the Pennsylvania Building, Suburban Building.

Q. Is that the office with which Captain Thorn was connected?

A. That is right, sir.

Q. And who directed the Atlantic & Gulf Stevedores what cargo to load in what holds, and on different occasions?

A. United States Army.

Q. Did you take any orders or directions from the representatives of the operator of the ship?

A. No, sir; they never gave any.

* * *

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(434) THEODORE KNOPF, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. ALSPACH:

Q. Mr. Knopf, will you state again your position with the Haenn Ship Ceiling?

A. General superintendent.

Q. Can you tell us, Mr. Knopf, who engaged the Haenn Ship Ceiling & Refitting Company to do work aboard the "John Dickinson" in November, 1947?

A. U. S. Army.

Q. And who directed you how many employees to send aboard the ship?

A. The army and I always got together on that.

Q. And who directed the Haenn Ship Ceiling Company as to what employees should work in different holds at different times?

A. We did that supervision ourselves—worked it out with the loading of the vessel to expedite it as soon as possible.

(435) Q. Did the officers of the vessel give you any instructions as to where you should work or at what hours?

A. No, never did on an army ship.

* * *

MR. ALSPACH: I would like to ask the stenographer to mark for identification the document which I am offering now, being a letter on the letterhead of the United States of America, United States Department of Commerce, Weather Bureau.

(Letter dated February 14, 1950, relating to weather conditions on November 16, 1947, was marked Exhibit D-4.)

MR. ALSPACH: Would Your Honor care to see this first?

THE COURT: No; go ahead.

MR. ALSPACH: If Your Honor please, I request permission to read to the members of the jury the contents of this report received.

Members of the jury, I have a letter on the letterhead of the United States Department of Commerce, Weather Bureau Station, Philadelphia, Pennsylvania, dated February 14, 1950. The letter is addressed to the law firm with which I am (436) associated, and to whom it may concern. The letter reads as follows:

"As the custodian of the records of the U. S. Weather Bureau, filed at Philadelphia, Pennsylvania, I hereby certify that the—" and then the word "attached" is obliterated—"is a true copy therefrom."

And there follows this typewritten insertion:

"In Philadelphia, Pennsylvania, on November 16, 1947, sky and visibility conditions were as follows:

"At City Office of Weather Bureau, New Customhouse, 2d & Chestnut Streets—Rain, continued from previous day, ended at 12:55 a. m., with only a trace during the hour 12 to 1 a. m. Skies were overcast until noon, with light fog prevailing from midnight to

12:05 p. m. Partly cloudy noon to 2 p. m., and clear remainder of day, with sun shining continuously from noon to sunset at 4:44 p. m.

"At Philadelphia International Airport office of the Weather Bureau, similar conditions prevailed, with light drizzling rain ending about 1 a. m., and light fog continuing until noon, with visibilities ranging from 2½ miles midnight to 10:15 a. m., 3 miles 10:15 a. m. to 11:30 a. m., 4 miles 11:30 a to 1:30 p. m., and improving to over 10 miles by 3 p. m."

This document is signed by H. P. Adams, Meteorologist (437) in Charge.

I offer that document in evidence, Your Honor.

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(446) (Conference at side bar.)

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(447) MR. MOUNT: There is one matter—while we are here I should like to save some time. I wish to place of record, if possible, by stipulation, the fact that the Haenn Ship Ceiling and Refitting Corporation has secured by an insurance policy the payment of compensation to the plaintiff against its liability as covered by the Longshoreman and Harbor Workers Act. Can we stipulate that fact?

MR. ALSPACH: Yes.

MR. LAKATOS: Yes, we can stipulate that fact, of course.

MR. LANDY: I have no objection to that.

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(455) EVIDENCE ON BEHALF OF THIRD-PARTY DEFENDANT.

FREDERICK ALBERT KNOPF, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. MOUNT:

Q. Mr. Knopf, what is your business?

A. I am foreman for George J. Haenn.

Q. How long have you been?

A. About 28 years with him. 27 to 28 years with him.

Q. What kind of business is their——

A. We do all kinds of shipfitting, refitting and laying up for grain, shoring off general cargo.

Q. Have you been on a number of ships that were to be fitted (456) for grain?

A. Oh, a few thousand; that is all.

Q. Were you on the S. S. "John Dickinson"?

A. Yes, sir.

Q. In November of 1947 when Mr. Hawn was injured?

A. Yes, sir.

Q. And what was your job that day?

A. The job was hatch foreman—or boss over all the men on the ship.

Q. Did you go down into number 4 tween deck?

A. I did, sir.

Q. Did you go once or more than once?

A. Twice, before the accident.

Q. When was the first time you went there?

A. The first time was in the morning when I took my foreman down there, showed him what to be done.

Q. And your foreman was whom?

A. Steve Skalicky.

Q. And about what time was that?

A. I recollect about quarter of eleven, half-past ten, quarter of eleven; somewhere in that time.

Q. How did you get down into the hold?

A. Went down the forward end, down the ladder.

Q. And when you went down were you able to see in the tween (457) deck?

A. Yes, sir.

Q. And what light was there there?

A. We had the light from up—the hatch covers off.

Q. You say——

A. The hatch covers were off, so I could get down in the hold. That was our light.

Q. How many hatch covers were off?

A. There was one right by the ladder off, and your sides were off.

Q. When you say they were off, do you mean physically off?

A. They were canted up on the side so we could see, but the one was off at the hatchway so I could get down the hatch and the men could go down the hatch.

Q. Now on the main deck of the ship how many sections of hatch covers are there?

A. Seven. That is, on the top deck, now.

Q. Yes, the top deck.

A. Seven hatch covers.

Q. And how many on the tween deck?

A. Six, on account there is tanks down below, and that seventh one takes care of loading for them tanks.

Q. In other words, the length of the entire hatch on the top deck is five feet longer than it is on the tween deck; is that (458) right?

A. Approximately five feet; that is right.

Q. And the ladder, the regular Jacob's ladder which leads down from the top deck to the tween deck is five feet farther forward down into the tween deck than the hatch, isn't it?

A. That answers for a landing platform for them tanks; that is right, yes, sir.

Q. So when you come off the ladder you step directly on to the steel part of the ship?

A. That is right, sir.

Q. Now in overcast weather it is customary to open the hatches as has been described here on the top deck in order to give light below?

A. No, we had two and three opened up that same day, and we call—what we call "put one on top of another". That leaves your light through and also gives you a chance to put them on quick in case of rain or anything like that—we just slide one over, put one on top of the other.

Q. Those in number 4 hatch were wedged up, it has been testified.

A. Well, we wedge them up—when the weather is very uncertain we wedge them up with a wedge which is 6 or 7 inches, and we cant them on an angle like that all along, and that gives you plenty of light in there.

Q. Is that the customary way of doing it in theatening (459) weather?

A. In threatening weather, yes.

Q. Now as part of the work which your company was doing, were you engaged to clean the hatches or the holds?

A. My men will not clean ships; they are carpenters; they are not cleaners.

Q. I mean, were you engaged to clean them?

A. No, sir.

Q. Did that apply before as well as after you got through work?

A. Before and after. They will not clean.

Q. Now when you went down in the number 4 tween deck the first time, you say it was in the morning. How long did you stay there, approximately?

A. Approximately about five minutes, to tell Steve what to do. That is all, because he knows generally what to do.

Q. Did you come out of that hold then?

A. Then I came out of that hold.

Q. And how did you come out?

A. Came out the same way I went down, the forward end.

Q. In reaching the ladder did you go over or cross any of the hatch boards?

A. In the afternoon——

Q. On the square of the hatch?

(460) A. I could walk all the way across there.

Q. But in the morning do you recall what the situation was as to the hatch covers then?

A. Not exactly, I do not, until I went back after dinner.

Q. Now the second time you went back was after dinner, and about what time was that?

A. That was—I got down with Cap Hawn; I took him out of number 3, and I told him to go down number 4, and I took him down there with me. Coming back to number 4 I went down there and showed him what to do, and you could walk right across the hatch covers.

Q. And after you showed him what to do——

A. I came right out and went into number 2 hatch.

Q. How long after that was it you heard he was injured?

A. It was not five minutes, because I can walk from 4 to 2 in about three minutes. I had no more than got down the hold, and I hadn't told my other foreman what to do that I split up from number 3, when somebody hollered, "Cap fell down the hold." I says, "You are a liar, because I was just talking to him three or four minutes ago."

He said, "No, go get the ambulance."

I said, "You kidding me?"

He says, "No, go get the ambulance," so I ran right out and got the ambulance.

(461) Q. This last time when you went down in number 4 tween deck did you notice whether there was grain or grain dust about the tween deck?

A. Well, there will always be a little grain dust in there, because they were running grain, and that feeder ex-

tends up from the tween deck. There is an opening, 4 by 6's all the way around that feeder, and that grain dust always rises, and we can't help that.

Q. Was the condition you found down there unusual?

A. No, the same as we done on thousands of them.

Q. What is the custom in the port of Philadelphia as to who is to furnish artifical lighting if it is needed in connection with your work?

MR. ALSPACH: That is objected to, Your Honor.

THE COURT: Why?

MR. ALSPACH: Because there is no testimony from the plaintiff that anyone connected with the ship was asked for lights at any time. I submit that the custom can not establish what was done here.

THE COURT: Well, there is testimony in this case which shows that he inquired ostensibly from some of the ship's company and light were furnished to cleaners, cluster lights.

MR. ALSPACH: The testimony is that lights were furnished cleaners the previous day, but on the day of the (462) accident, the Haenn men—one man said he saw a man in khaki pants, and that is the end of it.

THE COURT: That is true as to the specific act, but you said there was no evidence as to who furnished lights. There is evidence here that the ship's company did furnish lights upon request, although it was a day prior to the accident.

MR. LANDY: The day of the accident, to the Roberts Cleaners, who cleaned the 15th and 16th.

THE COURT: The very first witness.

MR. LANDY: That is right—had lights both days from the ship.

THE COURT: The foreman of the stevedores was the one who testified to that. I will overrule your objection, Mr. Alspach, and grant you an exception.

By Mr. Mount:

Q. Did you understand the question, Mr. Knopf?

A. What was the question again?

Q. The question is, what is the custom in the port of Philadelphia regarding the furnishing of artificial lights when they are required by shipfitters who are going aboard a vessel to do work?

A. Well, we do it this way. If the light is handy there, we take them and put them down the hold if we need them; if we (463) don't need them, we don't use them.

Q. Well, the question is, who is supposed, under the custom, to furnish the lights if they are needed?

A. The steamship. They have the lights rigged on the ship.

Cross-Examination.

By Mr. Alspach:

Q. Mr. Knopf, I gather it was your opinion, based on your observation of the tween deck, that there was no necessity for artificial illumination that day; is that correct?

A. That is correct.

* * *

Theodore Knopf, previously sworn, was examined and testified as follows:

The Court: That makes you a witness for everybody in the case now.

Direct Examination.

By Mr. Mount:

Q. Mr. Knopf, you have testified that you were the general superintendent for the Haenn Ship Ceiling and Refitting Corporation; is that right?

(464) A. That is right.

Q. Were you on the "John Dickinson" when she was here in November, 1947 prior to the time when Mr. Hawn was injured?

A. I was on it on the 15th, on the Saturday when it docked.

Q. What did you do when you were there?

A. When I was on there, I took a flashlight with me and went through every hatch, going down through the escape hatches, and inspected it.

Q. What was the purpose of your going on there?

A. Because the army sent me down; they wanted to load oats and the ship, they thought, was fit up for wheat.

Q. In the course of your inspection on the vessel did you find any condition there that was unusual?

A. No, not a bit.

Q. What type of ship was this?

A. Liberty.

Q. And was there anything unusual in the construction of this particular ship?

A. It is constructed the same as the rest of the Liberties.

Q. And had you and your men worked on Liberty ships before this?

A. In 1947 we worked on 112 of them in that year—not all Liberties, but biggest majority—about 75 to 80 per cent Liberties out of the 112.

(465) Q. Now, in the wings of the vessel, did she have lumber in her?

A. Yes, some lumber was on board.

Q. What was the condition of the decks with respect to the presence of grain or dust?

A. Well, that day before it came in, there were no hatches open when I inspected it, because I went through it with a flashlight, and every grain ship is dusty, even when it comes in.

Q. Did this ship have some amount of dust in it?

A. Yes, they all are.

Q. And is it customary for you and your men to go in grain ships and change fittings before the ships are swept up?

A. Yes.

Q. Now, are you engaged, and is it part of the work which you are engaged to do, to sweep the holds or clean the holds?

A. No, we do no cleaning.

Q. Who does that?

A. The cleaners. It is a business by itself.

Q. That is another type of work, a different type of labor; is that right?

A. Altogether. That is right.

Q. Now, when lights are required for the use of your men in working in the tween decks or lower holds, what is the custom (466) in Philadelphia as to who shall furnish the lights?

MR. ALSPACH: The same objection, Your Honor.

THE COURT: Objection overruled. Exception.

By MR. MOUNT:

Q. Do you understand what I mean?

A. I understand what you mean. If a foreman thinks he needs lights, he goes looking for them; if he can't find them he asks someone of the ship's personnel where they keep their lights.

Q. According to the custom who furnishes lights?

A. The ship always carries lights.

Q. Did you bring lights aboard as part of your permanent equipment?

A. No, we never bring them. Very rare.

CROSS-EXAMINATION.

* * *

(467) By MR. ALSPACH:

Q. And the condition which you observed at that time on the 15th, I think you said, was the usual and customary condition on arrival in port?

A. That was the regular condition that all ships that come back—anyone that carries grain.

Q. And the Haenn men have on many, many occasions worked under conditions such as you found then?

A. Sometimes worse conditions.

* * *

(470) THE COURT: Gentlemen, suppose we take up these points. All of us can think out loud as I read them. Point number 1, taking up plaintiff's points for charge.

(Reads plaintiff's request number 1, which was followed by discussion.)

THE COURT: I will affirm point number 1 with the proviso or understanding that I am going to qualify it as I have indicated, and I will grant both Mr. Alspach and Mr. Mount an exception to that.

(The Court read point number 2, which was followed by discussion.)

MR. MOUNT: What is Your Honor's ruling on number 2?

THE COURT: Number 2 I am going to qualify. It is for the jury to say. That is their question. I will qualify it by giving them the theory as I see it that the evidence presents.

* * *

(472) THE COURT: * * * Point 3.

(Reads point 3.)

I will affirm it with the understanding that certainly we address something to the jury with respect to the third-party plaintiffs and third-party defendants; that there are two actions here.

MR. MOUNT: I accept that.

THE COURT: I know you do, and I will grant you an exception to it.

(The Court reads paragraph 4.)

THE COURT: That is not a correct statement of the law. That I will refuse, and grant you an exception.

* * *

(474) THE COURT: That I will refuse as drawn, but in substance say the same thing.

You may have an exception to this, too, that I have refused. Mr. Mount, of course, excepts.

MR. MOUNT: No, I am not in that one.

THE COURT: I know you are not. You are interested in number 4, however.

(The Court reads point 6.)

THE COURT: I will affirm that.

MR. ALSPACH: Will Your Honor grant me an exception?

THE COURT: Exception.

* * *

(476) THE COURT: * * * Now the first of the defendants would be the third-party defendant.

* * *

(478) (The Court read point 6.)

THE COURT: Affirmed.

MR. ALSPACH: If Your Honor please, in connection with number 6, I think it would be important to note that it is certainly their concurrent duty to provide reasonably safe place to work. I think it admits that.

THE COURT: Well, isn't that the opposite of what he says? Number 6, he says, "If you find from all the evidence that Haenn Ship Ceiling & Refitting Corporation was not negligent, then your verdict should be in favor of said Haenn Ship Ceiling & Refitting Corporation."

MR. ALSPACH: But they, I understand, have an absolute duty to provide a safe place to work.

THE COURT: That is right.

(479) MR. ALSPACH: That absolute duty would not be decided by their negligence or freedom from negligence.

THE COURT: No, but it will certainly be part of my charge, or I will be in error. On these points for charge, you know, I won't be bound by just what I affirm here. The mere fact that I will affirm these and state them to the jury does not deter me from saying what I want to say to the jury.

MR. ALSPACH: Surely.

THE COURT: The original defendant and you, then, Mr. Alspach, may both have exceptions to that.

* * *

(481) MR. MOUNT: Your Honor will grant me an exception to such points——

THE COURT: Yes, to any points that I have in any way, modified, you have an exception to them, or to those that I have denied.

MR. MOUNT: May I have an exception to such of plaintiff's points as were affirmed, and such——

THE COURT: All parties will have to any points that I modify or deny.

MR. ALSPACH: Your Honor, I would like to withdraw request number 2. I think it is confusing, so will Your Honor ignore that request?

(The Court took up the points for charge submitted by the original defendant, Pope & Talbot.)

THE COURT: Number 1 is denied.

Number 2 is withdrawn.

Number 3 I deny as drawn, Mr. Alspach; and yet, the most important part of that point for your purposes I will tell the jury anyhow.

* * *

(484) (The Court read point 4.)

* * *

(485) THE COURT: I will deny it as drawn.

* * *

(The Court read number 6.)

THE COURT: That I will deny.

(The Court read number 7.)

THE COURT: I will deny that and leave it up to the jury.

(The Court read point 8.)

(486) THE COURT: That is for the jury.

(The Court read point 9.)

THE COURT: That I affirm.

MR. ALSPACH: If Your Honor please, I would like to withdraw that portion, "Or the unseaworthiness of the vessel."

MR. LANDY: We object to the withdrawal.

THE COURT: Why do you want to withdraw that?

MR. ALSPACH: Because it is inappropriate here. I think we are entitled to withdraw a point before Your Honor has passed on it. I would like to amend the point to omit the phrase "Or unseaworthiness of the vessel."

MR. LAKATOS: Your Honor, we would object to that, sir.

THE COURT: How do you mean you want to amend it?

MR. ALSPACH: We maintain, Your Honor, that the duty of the shipowners extends to stevedores under the Sieracki case.

THE COURT: Is limited to stevedores?

MR. ALSPACH: Yes, Your Honor, and does not extend to the employees of any independent contractor, such as a contractor employed to refit the hold for carriage of cargo.

THE COURT: Well, I would affirm the point as you have it prepared here and submit it, but I would deny——

(487) I will let you amend, if you want to amend of record.

MR. ALSPACH: I would like to amend, if Your Honor please.

THE COURT: All right, you may amend of record.

MR. ALSPACH: I would like to amend plaintiff's ninth point for charge by the omission of the words appearing after the last comma: "or the unseaworthiness of the vessel." Thank you, sir.

THE COURT: You are welcome, but I will deny that and grant you an exception.

(The Court read point 10.)

THE COURT: No, the jury has a right to that.

MR. MOUNT: I object to that.

THE COURT: Well, I will deny it as drawn, anyway, because he is entitled to whatever the jury fixes.

(The Court read point 11.)

THE COURT: I will affirm that.

MR. LANDY: Grant us exception, sir.

THE COURT: Yes, sir.

(The Court read point 12.)

THE COURT: That will be affirmed.

That seems to be the crop.

MR. ALSPACH: Will Your Honor grant me an exception (488) for the record?

THE COURT: Yes, you all may have exceptions to those points of charge which you have submitted and which have been denied.

* * *

CHARGE OF THE COURT.

McGRANERY, *J.*

Members of the jury, we have now arrived at the time when it is the duty of the Court to sum this matter up and to give you the law as it is applied to the facts that you have heard, and then for you to arrive at a verdict. This is what they call the charge of the Court. Many of you perhaps have heard that expression.

Incidentally, on this particular jury, we have had two supernumeraries or alternate jurors. One of the ladies who was a member of the jury was taken ill during the course of the trial, and so an alternate took her place. The fourteenth juror will leave you at the completion of the charge and you twelve will go off and have the matter to yourselves; therefore, the remaining alternate, juror number fourteen, will be relieved at the conclusion of the charge.

Now, what is this that we have that we are to consider, deliberate upon, and render a verdict? And that verdict must be a solemn one, because you have taken an oath to discharge your duties as jurors under the evidence as you hear it from the witness stand and the law as I give it to you.

Here we have an action brought by Mr. Hawn against Pope & Talbot, owners of the steamship "John Dickinson," on which ship, down at Girard Point, Mr. Hawn was working as a ship's carpenter, on November 16, 1947.

He was an employee at that time of the Haenn Ship Ceiling and Refitting Corporation, he was their employee, and they were under contract, as we have heard, by the War Department, the United States Army, to perform certain services aboard ship. I might say to you, ladies and gentlemen, as to that matter of contract, you might well forget about it as between Mr. Hawn, who was injured, and the shipping company, or owners of the vessel.

We have in maritime law what we call seaworthiness or unseaworthiness, and that is a duty that is taken by

the shipowner, represented in the captain or commanding officer of the vessel, to maintain that vessel in a shipworthy condition at all times. Shipworthiness has nothing to do with negligence, and shipworthiness does not mean that it is a big strong vessel that can buffet the waves and go from one port to another physically safe on arrival. To illustrate what I mean by the seaworthiness of a vessel —or shipworthiness, as I have referred to it—a vessel could be unseaworthy if you were a passenger aboard that ship, and you drank a cup of coffee, and in some way or other that cup had some kind of a nick in it that gave you a cut, or if your stateroom did not have a proper latch on it, and somebody just came in and pushed it open, when it should have had a good lock.

We often hear the term "everything shipshape." That did not come from nowhere, it is a pretty good term, it means a whole lot. It means to convey, when somebody tells you everything is shipshape, that everything is just right and as it should be. So with the seaworthiness of a vessel, everything is as it should be. It has nothing to do with negligence. That is a duty on the owner of the ship, to maintain his vessel in a seaworthy condition at all times. In the beginning it was because of the nature of the work. Once seamen put to sea they had no choice in the matter, they did the best they could with the things that were at hand, and if it were not seaworthy, if it were that which a good captain would not put to sea with, then he would be responsible for any injury that might result. That has been extended by the law, since now we find specialists doing the work that the seamen formerly did. In olden times the seamen loaded the ship, then stevedores came along, and then the law was extended to the stevedores who would perform the duties. That is the philosophy underlying the law, that ordinarily the work would have been performed by seamen.

In this particular case the plaintiff's theory is predicated on the unseaworthiness of the vessel, unseaworthi-

ness in the sense of maintaining the number 4 hatch on the tween deck in an unseaworthy condition, in that a hatch cover or hatch covers had been removed which should have been in place, and which, if they had been in place, therefore, would not have permitted Mr. Hawn to drop from the tween deck to the hold of the ship through that hatch, when he slipped. As I follow this case, that is the theory upon which you are to determine it.

There are two cases that you have to settle here. While Mr. Hawn sued Pope & Talbot, Pope & Talbot said, "Oh, no," their defense is that the ship was seaworthy, and that they had done everything that they would reasonably be expected and required to do, that if there was any negligence at all, Mr. Hawn's injuries were sustained as the result of the negligence of his own employer, the Haenn Ship Ceiling and Refitting Corporation.

Now, what is the law with respect to the relationship between Pope & Talbot, the owners of the "John Dickinson," and the Haenn Ship Ceiling and Refitting Corporation? The Haenn Ship Ceiling and Refitting Corporation, under the law, would be required, and they owed a duty to perform whatever services were to be performed aboard that ship in a reasonably safe manner.

When we speak of the seaworthiness of a ship that means that the captain or the shipowner is to maintain the equipment and appliances which were to be used at least free from defects that were known or should have been known.

Members of the jury, that will be your problem and your duty to reconcile the facts as you have heard them from the stand, in an application of the law as I have described it to you, and you will be bound by it.

What are your functions as jurors? Number 1, you are the sole judges of the facts. No matter what colloquies take place between counsel, or between the Court and counsel, or anyone or all of them, with respect to what a witness said or did not say, that does not matter, it is what you

recall that that witness said: If what I say in stating any facts to you now differs from your recollection, disregard what I say. I am going to say very little to you about the facts. I do not want to get into that field, lest you might be of the view that I want to lean one way or the other, or that I think one way or the other. I hope you will not think that I have any impressions one way or the other on the facts, and I hope you do not take into your deliberations, if I do mention some piece of evidence, the thought that I stress that for your consideration. I am not going to do that.

While you are the sole judges of the facts of the case, you are likewise the sole judges of the credibility of the witnesses who appeared on the stand here. What do we mean in law when we speak of the credibility of the witness? We mean simply this: How does that witness impress you? Does he have an interest in the outcome of the case? Would that interest that he has in the outcome of this case tend toward his coloring his testimony somewhat? In my experience I find that most people want to tell the truth and do tell the truth, but in our human minds, in our manner of observing and recollecting things, sometimes we get impressions which are not correct. Sometimes they are implanted after something happens, but we go home and go to our graves swearing that that is true, what we think happened, and perhaps it did not happen at all. What was the position of a witness to have observed the particular thing that he is speaking about? What is his ability to record facts in his own mind and retain them? What degree of intelligence does he have? When I speak of intelligence now I am not speaking of formal educational background, but the intelligence that he has to relate properly what he saw. Is he forthright in answering these questions that are directed to him? Or is he hedging? Is he trying to hold something back? How would you regard him if you were sitting across the table from him? Is there something further that you would like to probe that he does

not seem too clear about, or that he seems to be holding back, you might say? That is all for you, members of the jury, and for your consideration alone.

As you are the sole judges of the facts and of the credibility of the witnesses, I am the sole judge of the law, and what I say to you as to the law is binding upon you, under your oath. You must take it from me, no matter how unfairly you think I state it, because if I am wrong, what I say with respect to the law is recorded here by the reporter; it will be available to all counsel, they can take it to another court and have me put back on the right track if I am wrong.

In these cases, members of the jury, the burden is always on the plaintiff to prove by a preponderance of the evidence in this particular matter, one, that the ship was unseaworthy, two, that the owners of the vessel were negligent, and, in this particular case, three, whether or not the Haenn Ship Ceiling and Refitting Corporation carried out its obligation and duty to Pope & Talbot of performing this work in a reasonably safe manner.

While I say that the burden is on Mr. Hawn to prove those things to you by a preponderance of the evidence, if he has, then the burden shifts over to the other side.

What have they said by way of defense? You have heard both sides now and I am not going to say anything about it. If Mr. Hawn has not met that burden, and he has not satisfied you by a preponderance of the evidence that the ship was unseaworthy, or that there was negligence on the part of Pope & Talbot, on the one hand, or that the Haenn Ship Ceiling and Refitting Corporation did not perform this work in a reasonably safe manner, on the other hand, that is the end of the case, you just drop it right there.

What is negligence? Negligence, members of the jury, is the absence of due care under the circumstances. It means exactly what it says and what we all know it to be, that it is the failure of a reasonably prudent man to do that which under the circumstances he ought to do, or the con-

verse, the doing of that which a reasonably prudent man would not have done under the circumstances. It can be an act of omission as well as one of commission.

The only evidence we have here of what Mr. Hawn was doing at the particular instant of the accident is that he was standing on the hatch cover, he suddenly turned around, he slipped, and he was in the bottom of the hold. Nobody saw him until after he had fallen into the hold. All of the evidence with respect to the condition of the tween deck and the hatch covers, and who took them off, is for you. There is nothing further that this Court can give you with respect to the happening of the accident. Accidents happen and sometimes they happen without the fault of anyone, they are really accidents, no one is at fault. For some reason or other they happen and are unexplained, but because of the happening of an accident alone one may not recover damages. In this case we have to find either that the ship was unseaworthy or that there was some breach of a duty that Pope & Talbot owed to Mr. Hawn as a foreman carpenter on that day, because he can only recover a verdict against Pope & Talbot. If you find a verdict in his favor your verdict must be against Pope & Talbot for either the unseaworthiness of the vessel or the negligence of Pope & Talbot. I am going to submit interrogatories to you, members of the jury, in order to keep it clear in your minds. On the other hand, if he was injured as a result of the negligence of both Pope & Talbot and the Haenn Ship Ceiling and Refitting Corporation, you will say so. I will have an interrogatory for that. If he was injured as the result of some negligence for which the ship was responsible, but which you find under the evidence, and under the contract given out to Haenn Ship Ceiling and Refitting Company, involved the breach of some duty on their part, then you will render a verdict in favor of Pope & Talbot and against Haenn Ship Ceiling and Refitting Corporation.

Are those things clear to you, members of the jury?

If you find that there was some negligence or unseaworthiness, then you proceed to the question of damages. What are the items of damage which Mr. Hawn would be entitled to recover?

He would be entitled to recover his hospital bill, that $836.15.

If you believe that these operations which have been described to you will be performed, he would also be entitled to be compensated for that. You have heard what the doctor said about how much they cost.

He would be entitled to recover for the wages that he lost as a result of the injuries, from November 17, 1947, until today. There is some question as to what those wages are. There are in the evidence income tax returns for the past five years prior to 1947, and including 1947. They are evidence of his earnings. Although there is no evidence on the subject, you do know from your own knowledge that longshore work was rather full and hectic during the war years. You are not permitted to speculate, members of the jury, so therefore you will take the average earnings of those five years. You will consider those as his earnings, because there is no other evidence that we have, and we are not permitted to speculate.

He also would be entitled to be compensated for any loss of future earnings, and in this connection you have had much conversation and some evidence about these mortality tables. The man was on the stand, this actuarial expert, and he told you how they arrive at these groupings, but, members of the jury, you have better evidence than that, which always impresses me more, and that is the particular person appearing on the witness stand himself. We do not all fit into that particular group that these actuaries have, the good Lord has a way of upsetting their plans so far as we as individuals are concerned. Some of us used to hear the old folks say: He grew old before his years. You often heard that expression, and it is a good one, it came from somewhere and it has some real meaning; in its ap-

plication it sometimes has a far greater significance than any book can give us.

You have seen Mr. Hawn on the stand. You have heard the type of work in which he has been engaged all his life. Had it not been for this accident how long could Mr. Hawn perform that work? Aside from that, what is his background? What would he be capable of doing? Would he be capable of going on to some other occupation? If so, what? I recollect that the background was that he left school at the fourth grade, worked around, and then at the age of seventeen went to work longshore, and went to work as a woodbutcher, a carpenter. How long could he continue with that if this accident had not happened?

Then you must consider the medical testimony, members of the jury. You have heard much about the os calcis, about the first lumbar vertebra, and about arthritis. You have heard that arthritis is always associated with any bone changes. We also know from common experience that arthritis in the chemical makeup of some people is present and is progressive. We can observe folks going along the street, whose backs are hunched, and some of them have lumps as though you had put something up under their coats—an arthritic developmental change, and it is very common in those who are engaged in hard labor, particularly in the back. How much of that was the result of the injury? How much of that was progressive and would be present in the absence of the injury? You have to reconcile those things, members of the jury.

The situation with the foot is somewhat different. While there is an arthritic developmental condition going on there, nevertheless the testimony admitted by all is of a spur or a burr of bone, which is down there, and which will not give him the motion in the foot that he ought to have; the foot is not weight-bearing, as a good foot would be. That can be relieved, as you have heard. One side said that they would recommend it, and the other side said that they would not. One side said that it is a very easy opera-

tion, that it would relieve the pain, and that it would permit of weight bearing, but would stiffen and render immobile the ankle action of the foot.

Members of the jury, you have heard the time that he spent in the hospital, you have heard the treatment given him there, you have heard the time that he spent in bed at home, you have heard all of the treatment given him, and then you have also heard Dr. Cancelmo say that Mr. Hawn had been suffering from asthma and that he had emphysema, which he described to be a blowing out of the lung from asthma of long standing—you might well liken it to what we see in these little balloons that the children blow up, sometimes they have a weak spot and there is like a wart going out on the ouside. From trying to breathe these things happen in there. There is one thing that is significant about that, however, members of the jury, and I think it is my duty to point it out to you, that nowhere in the five years previous to the happening of the accident was there indicated any time lost by reason of illness.

Your verdict, of course, members of the jury, must be unanimous.

There is one other thing I might say to you, which is somewhat in line with the actuarial experience, and, of course, testimony was given by the same man, and that is this matter of the present worth of a dollar. I think I ought to give you some instructions about that, and I hope it will not make it more confusing to you. If you are not straight on it I wish you would speak up, because it is one of the matters with which we have difficulty. Usually there are some folks on the jury who are familiar with the question and who are able to work it out.

There was a time when you could think that that was all right, you could work it out, that a man knew if he had $10,000, come the first of the year, he would get a return of $600 or better in interest on that investment—that was the legal rate. As a matter of fact, that was almost a requirement, that money be invested that way, in mortgages,

bonds, and what have you. With the changing conditions, however, and with the freedom in circulation of dollars, we hear it said that money becomes cheap, or money becomes hard; there are so many different ways of handling that, but it is your duty, members of the jury, to weigh it out very carefully. I am not going to get into rates of interest with you, because your own experience must serve you in that connection. There is no such thing as a positive, fixed rate.

In that connection, members of the jury, the present worth of the dollar, if you see fit to award damages in this case, means this for your purposes, that whatever standard you use by way of a rate of interest, you will not consider that you are awarding any trust fund where a person would be able to take down so much a week and then at his death leave the balance to his widow, or to his family, or to his pet charity.

After you have agreed on the questions of unseaworthiness and negligence, you agree on the period of time that he would be gainfully employed at his work if this accident had not happened, you figure out what his earnings would be for that period of time, and then, because you are going to award him all of that today, it has a present worth which would be much greater than if you said that he was to get so much per week. That means this, that he will get so much per week, but on the day that you jurors determine as the time when his gainful employment would end and he would be employed no more, he would not have one nickel left.

Is that clear? If it is not, members of the jury, I wish you would say something about it.

JUROR No. 1: Your Honor, it is not quite clear to me.

THE COURT: In what respect, without getting into a controversy here about it?

JUROR No. 1: I did not quite understand your conclusion about it.

THE COURT: There is to be nothing left?

JUROR No. 1: That is right.

THE COURT: There is to be nothing left. Number one, you arrive at the date at which he will be no longer gainfully employed, and you say that is over a period of whatever time you fix; then you give him a sum of money today, the present worth of which will give him so much a week, but on that day that you have predetermined in your mind there will not be a penny left, it will be all gone. It is not the date of his death, either, it is the end of the road for his gainful employment, the end of the road that comes to all of us someday.

Members of the jury, I have been requested by all of the parties here to submit to you points for charge. As I read them to you, it is the law that will govern your deliberations, and I will take the plaintiff's points for charge first:

"Under the maritime law there was an absolute duty on the part of defendant, Pope & Talbot, Inc., the operator of the S. S. 'John Dickinson' to provide a safe and seaworthy vessel and to supply and keep in order the appliances and equipment appurtenant to the ship for the safe use of all shore side workers rendering services with the consent of the defendant, Pope & Talbot, Inc., and necessary in the performance of the ship's business. This duty extended to the plaintiff who was on board the 'John Dickinson' with the consent of the defendant, Pope & Talbot, Inc., and who was engaged in preparing the ship to receive cargo. This obligation is absolute in character and is not satisfied by the mere exercise of reasonable care. In other words, under the maritime law the operators of the S. S. 'John Dickinson' are liable for any injuries sustained by the plaintiff by reason of the unseaworthiness of the ship or defects in its appliances and this liability follows even if defendant, Pope & Talbot, Inc.,

has exercised due care. Therefore, if you should find that at the time the S. S. 'John Dickinson' arrived in the port of Philadelphia and before the shore side workers commenced working on the vessel two hatch covers were missing from the hatch in the tween deck of the No. 4 hold, and that by reason thereof plaintiff fell to the hold below and was injured, your verdict should be for the plaintiff and against Pope & Talbot, Inc., even if you should also find that Pope & Talbot, Inc., was not guilty of negligence for any such case, the liability of Pope & Talbot, Inc., is absolute and does not depend upon its failure to exercise due care. In this respect the maritime law differs from the law as generally applied to injuries sustained ashore where proof of negligence is essential to the recovery of damages for personal injuries."

I think it is pretty clear to all of us.

"In addition to the duty to provide a safe and seaworthy vessel and to supply and keep in order the appliances and equipment appurtenant to the ship, it was the further obligation of defendant, Pope & Talbot, Inc. to provide plaintiff with a reasonably safe place in which to perform his work aboard the S. S. 'John Dickinson' and to exercise due diligence and care in keeping the ship reasonably secure against danger or injury to the plaintiff. This duty is one imposed upon Pope & Talbot, Inc., by the maritime law. It is a duty which it cannot delegate to another and, therefore, it is one which Pope & Talbot, Inc. cannot contract away."

That is what I wanted to make clear, with that officer of the army that we had here, they cannot contract that duty of the seaworthiness of the vessel away.

"If you should find, therefore, that hatch covers in the tween deck of No. 4 hold of the S. S. 'John

Dickinson' were missing, and that the ship's officers or crew failed to warn the plaintiff of the existence of this condition, or that the defendant, Pope & Talbot, Inc. failed or neglected to supply the Haenn Company men with adequate lighting in the tween deck area of the No. 4 hold, or that there was grain and grain dust on the hatch covers of the tween deck of the No. 4 hold rendering the hatch covers slippery, and that defendant, Pope & Talbot, Inc. failed to use reasonable means to correct this condition, then you may find that Pope & Talbot, Inc. failed to exercise due diligence in providing the plaintiff with a reasonably safe place in which to work. Should you further find that as a result of any or all of these conditions in the tween deck area of the No. 4 hold the plaintiff fell to the hold below and was injured, your verdict should likewise be for the plaintiff and against Pope & Talbot, Inc. In other words, your verdict should be for the plaintiff and against Pope & Talbot, Inc. if you should find that the accident and the consequent injuries to plaintiff resulted from either the unseaworthiness of the S. S. 'John Dickinson' or the negligence of the employees or agents of Pope & Talbot, Inc., or both."

I might say, members of the jury, that the agents or the employees of the steamship company, their acts would be binding upon the steamship company, the owners.

"You can find for the defendant, Pope & Talbot, Inc. and against the plaintiff only if you should conclude that plaintiff's injuries were occasioned neither by the unseaworthiness of the S. S. 'John Dickinson' nor by the negligence of the agents and employees of Pope & Talbot, Inc.

"If you should conclude that plaintiff's injuries were occasioned by either or both the unseaworthy condition of the hatch boards in the tween deck of the No. 4 hold of the S. S. 'John Dickinson', or the negli-

gence of Pope & Talbot, Inc. in failing to exercise due diligence in supplying plaintiff with a reasonably safe place in which to work, your verdict should be for the plaintiff even if you should further find that Haenn Ship Ceiling & Refitting Corporation, through its employees, was likewise negligent toward the plaintiff since the negligence of Haenn Ship Ceiling & Refitting Corporation, if any, does not relieve Pope & Talbot, Inc. of its liability to plaintiff."

You understand that, do you not? Your verdict in that case would be to Pope & Talbot from the Haenn Ship Ceiling, but you award your damages to Mr. Hawn from Pope & Talbot, and then later find the other thing.

"Therefore, if you should find that Pope & Talbot, Inc. was responsible for creating a dangerous condition which resulted in plaintiff's injuries, your verdict should be for the plaintiff, irrespective of the negligence, if any, of Haenn Ship Ceiling & Refitting Corporation."

That is the law.

"If you find that the plaintiff's injuries were due to the negligence of Pope & Talbot, Inc. or the unseaworthiness of the S. S. 'John Dickinson', or both, then you must award damages to the plaintiff for all of the consequential injuries."

"If you find that the plaintiff is entitled to damages then you should award him a fair and reasonable sum as in your judgment will compensate him for any loss of the use of his back and left foot and for the deformities, disfigurement and the inconvenience arising out of the said injuries."

I might also say there, members of the jury, that in addition to the damages upon which I have instructed you or given you some direction, you must also find for the pain and suffering, and here again we have no yardstick

to give you to measure the sum that must be allotted, it must be fair, it must be just. What that sum is you must determine from the evidence that you have heard from the plaintiff himself, from the doctors who have testified; the nature and the extent of the injuries, and the pain involved.

"If you find that the plaintiff is entitled to damages, then you should also award him the reasonable cost of medical care and attention occasioned by his injuries."

You are limited, members of the jury, to what you have heard, and what you would reasonably expect to flow from these injuries.

"And if you should find that he may have to undergo further operations and receive further medical attention for his injuries, then you should also award the reasonable cost thereof.

"If you find that the plaintiff is entitled to damages, then you must award him, in addition to the other elements of damage, a fair and reasonable sum, as in your judgment, will compensate for all of the pain and suffering which he has endured in connection with his injuries in the past and which you may find he will endure in the future, arising out of his injuries."

Now, the next, members of the jury, will be the points for charge submitted by Mr. Alspach for Pope & Talbot:

"Haenn Ship Ceiling and Refitting Corporation, the plaintiff's employer, had a duty to make an inspection and examination of the hold and hatch boards upon which its employees were working and to furnish competent foremen or other persons to supervise the work of the carpenters in order to prevent injury to any of its employees."

That is correct.

"You may not find in favor of the Plaintiff unless he has established, by a fair preponderance of the evidence, that his accident was caused, in whole or in part, by some negligence on the part of the Defendant, or the unseaworthiness of the vessel."

"If you find that the Plaintiff, Charles Hawn, failed to observe the opening through which he descended into the lower hold and, if you further find that such failure was due to a lack of reasonable care on his part, and that such failure caused the accident in whole or in part, then the Plaintiff is guilty of contributory negligence and you will reduce any amount of damages which you may award him."

Right there, I overlooked saying anything to you, members of the jury, with respect to contributory negligence.

That, too, is a part of the law, and Mr. Hawn would be charged with the duty of performing his work, the type of work he was doing, in a reasonably careful manner under all the circumstances.

"The Plaintiff may not recover from the Defendant simply because he sustained injuries while on board the Steamship 'John Dickinson'."

I have said that.

These are the points for charge submitted by the third-party defendant, the Haenn Ship Ceiling and Refitting Corporation:

"Under the law you cannot render a verdict in favor of the plaintiff directly against the third party defendant, Haenn Ship Ceiling and Refitting Corporation."

I think we have made that very clear, have we not?

"If you find that the negligence of Pope & Talbot, Inc., as operator of the vessel, caused the plaintiff's

injury, then and only then may you consider the question of whether Haenn Ship Ceiling and Refitting Corporation was negligent."

That is true.

"If you find from all the evidence that Haenn Ship Ceiling and Refitting Corporation was not negligent, then your verdict should be in favor of said Haenn Ship Ceiling and Refitting Corporation."

That is correct.

"If you find that the conditions of work in No. 4 'tween deck, where the plaintiff was injured, were the usual and customary conditions expected to be encountered in performing the work of refitting this vessel, then your verdict must be in favor of Haenn Ship Ceiling and Refitting Corporation."

That is true.

"If you find that the plaintiff's injuries were caused solely by his own negligence"—entirely by his own negligence—"then your verdict must be in favor of Haenn Ship Ceiling and Refitting Corporation."

Of course, it would be a verdict all the way along the line against him there.

"If you find that the plaintiff is entitled to recover from Pope & Talbot, Inc. and if you further find that the plaintiff's injuries were caused in part by his own negligence in failing to look where he was going, or in any other particular, then you will reduce the amount to which he otherwise would be entitled by the percentage which you find that his own negligence contributed to his injury."

I think I can simplify that a little for you, members of the jury, by the interrogatories that I have prepared here, at least I am hopeful that they will simplify it.

Members of the jury, I have drawn up these interrogatories which I will give to your foreman, and you answer these yes or no:

"1. Was the S. S. 'John Dickinson' unseaworthy?"

You answer that yes or no.

"2. Was Pope & Talbot, Inc. negligent?"

Yes or no.

"3. Was Haenn Ship Ceiling & Refitting Corporation negligent?

"4. Were both Pope & Talbot, Inc. and Haenn Ship Ceiling & Refitting Corporation negligent?

"5. Was plaintiff guilty of contributory negligence?"

Did he contribute to his own accident?

If you find that he was guilty of some contributory negligence, members of the jury, I would like you to place in here, and I have a line for you to say, what percentage of his contributory negligence contributed to the accident, the percentage of it.

"7. Do you find for the plaintiff or for the defendant Pope & Talbot, Inc.?

"8. If you find for the plaintiff, what is the full amount of the verdict without consideration of contributory negligence?"

Give the full amount of the verdict, do not reduce the verdict. You tell the Court by this interrogatory the percentage that you believe the plaintiff might be guilty of contributory negligence, and then we will be charged with the mathematics. We will free you of that. You give the full verdict of what you think it ought to be, or what you arrive at, mark down the percentage of contributory negligence, and then we will handle the mathematics.

Now, members of the jury, I am sorry to have detained you, but I think it might be better this way, for you to have your lunch now and go ahead.

Is there anything further you gentlemen would like?

MR. LANDY: Your Honor will just grant us an exception on those portions of our points which have been denied?

THE COURT: Yes.

MR. LANDY: Would Your Honor also charge the jury that the burden of proving contributory negligence is upon the defendant, that is, the contributory negligence of the plaintiff?

THE COURT: Members of the jury, the law with respect to that is this: That, number 1, the burden is on the plaintiff himself to establish the unseaworthiness in this case, or negligence, by a preponderance of the evidence; however, the burden is upon the defendant to show, number 1, that he is to be excused entirely, or, number 2, if it did happen, then it happened because of the contributory negligence of the plaintiff himself. He must show you that, that is the law, as I understand it.

Is there anything further, gentlemen?

MR. ALSPACH: If Your Honor please, I ask for an exception to that portion of Your Honor's charge dealing with the question of unseaworthiness, your instructions pursuant thereto.

THE COURT: Which specific part, Mr. Alspach?

MR. ALSPACH: The entire question of unseaworthiness, Your Honor. It is our contention—I do not think it is proper for me to elaborate on it any further at this point, but it is our contention that unseaworthiness plays no part in this factual setup, and I therefore ask for an exception to that portion of Your Honor's charge dealing therewith.

THE COURT: You have that.

MR. ALSPACH: I ask Your Honor to charge that the defendant Pope & Talbot, even if it is liable on the ground of unseaworthiness, could not be held liable simply because at the time of the accident a hatch board was missing, that the duty of seaworthiness, if it exists, extends as of the time when the operator of the vessel turns over the place of work to the contractor to perform work therein.

THE COURT: I gave to the jury very explicitly, I not only gave it to them, but I read it, so there would not be any question about it, that it was the duty to maintain the equipment and appliances for these men to use at least free from defects that were known or should have been known.

That is the law, members of the jury.

MR. ALSPACH: I ask Your Honor to charge the jury that even if they find that there is unseaworthiness or negligence on our part, that the plaintiff must further establish by a preponderance of the evidence that either one or both was the proximate cause of the accident.

THE COURT: They have that. I think we went over that five or six times.

MR. ALSPACH: I ask for an exception to that portion of Your Honor's charge dealing with present worth, if Your Honor please.

THE COURT: What would you have me charge with respect to present worth?

MR. ALSPACH: I ask Your Honor to charge the jury that by present worth is meant the awarding of a sum now which ordinarily the plaintiff would not be entitled to until sometime in the future, therefore, the aggregate amount which represents the present worth of that money is less than the amount would it be had it been paid over a period of years.

THE COURT: I would prefer to let my own stand. I will grant you an exception to that.

MR. ALSPACH: I ask Your Honor to charge the jury that the fact that Your Honor has discussed damages at some length is no indication that the Court believes that damages are to be awarded by the jury.

THE COURT: I have already said that.

MR. ALSPACH: Thank you, sir.

I ask for a general exception to Your Honor's charge.

MR. MOUNT: If Your Honor please, I ask for an exception to that part of Your Honor's charge in which you said that the earnings during the war period—the average of the earnings for the last five years, which include the war period—is to be the measure of damages since November 16, 1947.

THE COURT: I do not think I said that, Mr. Mount.

MR. MOUNT: I think you did, sir.

THE COURT: If I did, members of the jury, I will certainly correct it. That was not intended to be said by me. I said that on the amount of damages we can not speculate as to what happened between November 16, 1947, and today, and while we do not speculate into the future, nevertheless we have all these factors to take into consideration, the type of work that he was doing, his ability to carry on, his background. I explained to you about his arthritis, and the former years. Would his wages remain at that level? Would they become higher? Would they become lower? That is within your province, members of the jury.

MR. MOUNT: I think Your Honor inadvertently stated what I said, and that is the only reason I wanted to bring it to your attention.

THE COURT: I am glad you did, because that is the law. You are not bound by that.

MR. MOUNT: And also with his gainful employment, if they are using the basis of wages as a ship's carpenter, they should look upon his gainful employment as such. In

other words, in determining that, they should have in mind that he might be able to do some other type of work——

THE COURT: I told them that. He went to the fourth grade. I explained that, just what he could do.

MR. MOUNT: I think that is all, sir.

THE COURT: Members of the jury, the bailiff will be brought forward and sworn, and then you can have whatever exhibits are in the evidence, and you may take them with you. You may go to lunch now and the interrogatories will be given to your foreman.

(The jury retired at 1:30 P. M.)

* * *

(The plaintiff submitted the following points for charge:

The Learned Trial Judge is requested to charge the jury on behalf of the plaintiff as follows:

1. Under the maritime law there was an absolute duty on the part of defendant, Pope & Talbot, Inc., the operator of the S. S. "John Dickinson" to provide a safe and seaworthy vessel and to supply and keep in order the appliances and equipment appurtenant to the ship for the safe use of all shore side workers rendering services with the consent of the defendant, Pope & Talbot, Inc., and necessary in the performance of the ship's business. This duty extended to the plaintiff who was on board the S. S. "John Dickinson" with the consent of the defendant, Pope & Talbot, Inc., and who was engaged in preparing the ship to receive cargo. This obligation is absolute in character and is not satisfied by the mere exercise of reasonable care. In other words, under the maritime law the operators of the S. S. "John Dickinson" are liable for any injuries sustained by the plaintiff by reason of the unseaworthiness of the ship or defects in its appliances and this liability follows even if defendant, Pope & Talbot, Inc., has exercised due care. Therefore, if you should find that at the time

the S. S. "John Dickinson" arrived in the port of Philadelphia and before the shore side workers commenced working on the vessel two hatch covers were missing from the hatch in the tween deck of the No. 4 hold, and that by reason thereof plaintiff fell to the hold below and was injured, your verdict should be for the plaintiff and against Pope & Talbot, Inc., even if you should also find that Pope & Talbot, Inc. was not guilty of negligence for any such case, the liability of Pope & Talbot, Inc. is absolute and does not depend upon its failure to exercise due care. In this respect the maritime law differs from the law as generally applied to injuries sustained ashore where proof of negligence is essential to the recovery of damages for personal injuries.

2. In addition to the duty to provide a safe and seaworthy vessel and to supply and keep in order the appliances and equipment appurtenant to the ship, it was the further obligation of defendant, Pope & Talbot, Inc. to provide plaintiff with a reasonably safe place in which to perform his work aboard the S. S. "John Dickinson" and to exercise due diligence and care in keeping the ship reasonably secure against danger or injury to the plaintiff. This duty is one imposed upon Pope & Talbot, Inc., by the maritime law. It is a duty which it cannot delegate to another and, therefore, it is one which Pope & Talbot, Inc. cannot contract away. If you should find, therefore, that hatch covers in the tween deck of No. 4 hold of the S. S. "John Dickinson" were missing, and that the ship's officers or crew failed to warn the plaintiff of the existence of this condition, or that the defendant, Pope & Talbot, Inc. failed or neglected to supply the Haenn Company men with adequate lighting in the tween deck area of the No. 4 hold, or that there was grain and grain dust on the hatch covers of the tween deck of the No. 4 hold rendering the hatch covers slippery, and that defendant, Pope & Talbot, Inc. failed to use reasonable means to correct this condition, then you may find that Pope & Talbot, Inc. failed to exer-

cise due diligence in providing the plaintiff with a reasonably safe place in which to work. Should you further find that as a result of any or all of these conditions in the tween deck area of the No. 4 hold plaintiff fell to the hold below and was injured, your verdict should likewise be for the plaintiff and against Pope & Talbot, Inc. In other words, your verdict should be for the plaintiff and against Pope & Talbot, Inc. if you should find that the accident and the consequent injuries to plaintiff resulted from either the unseaworthiness of the S. S. "John Dickinson" or the negligence of the employees or agents of Pope & Talbot, Inc., or both. You can find for the defendant, Pope & Talbot, Inc. and against the plaintiff only if you should conclude that plaintiff's injuries were occasioned neither by the unseaworthiness of the S. S. "John Dickinson" nor by the negligence of the agents and employees of Pope & Talbot, Inc.

3. If you should conclude that plaintiff's injuries were occasioned by either or both the unseaworthy condition of the hatch boards in the tween deck of the No. 4 hold of the S. S. "John Dickinson", or the negligence of Pope & Talbot, Inc. in failing to exercise due diligence in supplying plaintiff with a reasonably safe place in which to work, your verdict should be for the plaintiff even if you should further find that Haenn Ship Ceiling & Refitting Corporation, through its employees, was likewise negligent toward the plaintiff since the negligence of Haenn Ship Ceiling & Refitting Corporation, if any, does not relieve Pope & Talbot, Inc. of its liability to plaintiff. Therefore, if you should find that Pope & Talbot, Inc. was responsible for creating a dangerous condition which resulted in plaintiff's injuries, your verdict should be for the plaintiff, irrespective of the negligence, if any, of Haenn Ship Ceiling & Refitting Corporation.

4. If you should find for the plaintiff, your verdict must be for the plaintiff and against Pope & Talbot, Inc.,

for under the law, plaintiff can recover damages against Pope & Talbot, Inc. alone. He cannot recover any damages against Haenn Ship Ceiling & Refitting Corporation, and this is true whether or not you should find that Haenn Ship Ceiling & Refitting Corporation was concurrently at fault with Pope & Talbot, Inc.

5. I charge you as a matter of law that the fact that the Army hired Atlantic & Gulf Stevedores, Inc. to load the S. S. "John Dickinson" or that the Army hired the Haenn Ship Ceiling & Refitting Corporation to make alterations in the tween decks to prepare the ship for receiving cargo, or that the Army hired Roberts Ship Cleaning Company to clean the holds of the ship, and the further fact that these three shore side contractors may have taken their instructions from the Army, in no way alters the duty of Pope & Talbot, Inc. to furnish the plaintiff with a seaworthy vessel and a reasonably safe place in which to work. Therefore, if you should find that the S. S. "John Dickinson" was unseaworthy or that Pope & Talbot, Inc. breached its obligation to furnish plaintiff with a reasonably safe place in which to perform his work, your verdict should be for the plaintiff despite the role which under the evidence you may find that the Army played in connection with the cleaning, refitting and loading of the S. S. "John Dickinson".

6. If you find that the plaintiff's injuries were due to the negligence of Pope & Talbot, Inc. or the unseaworthiness of the S. S. "John Dickinson", or both, then you must award damages to the plaintiff for all of the consequential injuries.

7. If you find that the plaintiff is entitled to damages and that he has suffered monetary loss in the past as a result thereof, then your verdict should include such sum as would compensate for all such past monetary losses.

8. If you find that the plaintiff is entitled to damages and that he will suffer monetary loss in the future, then you must award him the present value of such sum as you find will compensate for all future losses. In determining such future losses, if you find that the plaintiff has suffered disability which will impair his earning capacity in the future, then you must consider such impaired earning capacity in determining the amount of the plaintiff's future losses.

9. In determining the extent to which the earning capacity of the plaintiff might have been impaired by his injuries, you may take into consideration what he had been earning in the past and the probabilities of what his earnings would have been in the future, if he had not received his injury.

10. In assessing any damages to which you find the plaintiff may be entitled, if you find that the plaintiff's earning capacity has been permanently impaired, you may consider the life expectancy of the plaintiff and the annual loss which will be occasioned to the plaintiff by reason of his injuries, resulting from the accident. In this connection, you may consider plaintiff's life expectancy and the evidence relating to the present value of a dollar which was presented to you from the witness stand and you may use this evidence in the determination of the amount of any future damages to which you may find the plaintiff to be entitled.

11. If you find that the plaintiff is entitled to damages then you should award him a fair and reasonable sum as in your judgment will compensate him for any loss of the use of his back and left foot and for the deformities, disfigurement and the inconvenience arising out of the said injuries.

12. If you find that the plaintiff is entitled to damages, then you should also award him the reasonable cost of

medical care and attention occasioned by his injuries, and if you should find that he may have to undergo further operations and receive further medical attention for his injuries, then you should also award the reasonable cost thereof.

13. If you find that the plaintiff is entitled to damages, then you must award him, in addition to the other elements of damage, a fair and reasonable sum, as in your judgment, will compensate for all of the pain and suffering which he has endured in connection with his injuries in the past and which you may find he will endure in the future, arising out of his injuries.)

(The defendant submitted the following points for charge:

1. Under all of the evidence your verdict should be for the Defendant and against the Plaintiff.

2. The Defendant, Pope & Talbot, Inc., is liable to the Plaintiff only if you find that it turned over the place of work to the employees of Haenn Ship Ceiling and Refitting Corporation and if, at such time, the vessel was unseaworthy or the Defendant negligent, and the place of work furnished for the employees of Haenn Ship Ceiling and Refitting Corporation was not reasonably safe under all of the circumstances by reason of the unseaworthiness of the ship or the negligence of Pope & Talbot, Inc.

3. If you find that the Defendant, Pope & Talbot, Inc. did not order the employees of Haenn Ship Ceiling and Refitting Corporation to perform work in No. 4 'tween deck, and that the agents, servants and employees of Pope & Talbot, Inc. did not know, and had no reason to know, of the existence of any unsafe or dangerous condition at the No. 4 'tween deck was turned over to employees of Haenn Ship Ceiling and Refitting Corporation, then your verdict must be for the Defendant.

4. Haenn Ship Ceiling and Refitting Corporation had a duty to furnish its employees with a reasonably safe place to perform the work they were assigned to do and if you find that the place of work became unsafe after the employees of Haenn Ship Ceiling and Refitting Corporation began to work there or that Haenn Ship Ceiling and Refitting Corporation failed to take reasonable steps to furnish its employees with a reasonably safe place to work, then the Plaintiff is not entitled to recover in this action against the Defendant.

5. Haenn Ship Ceiling and Refitting Corporation, the plaintiff's employer, had a duty to make an inspection and examination of the hold and hatch boards upon which its employees were working and to furnish competent foremen or other persons to supervise the work of the carpenters in order to prevent injury to any of its employees.

6. After a vessel operator has turned over control of a part of the vessel to an independent contractor, and that part of the vessel is under control of the contractor, the vessel operator has no duty to supervise or control the manner in which the contractor or his employees performed the work.

7. There is no evidence in this case that the employees of Atlantic & Gulf Stevedores, Inc. permitted any grain to spill over the feeder box and onto the hatch boards of No. 4 'tween deck.

8. The Defendant, Pope & Talbot, Inc., had no legal duty to furnish lights for the employees of Haenn Ship Ceiling and Refitting Corporation.

9. You may not find in favor of the Plaintiff unless he has established, by a fair preponderance of the evidence, that his accident was caused, in whole or in part, by some negligence on the part of the Defendant, or the unseaworthiness of the vessel.

10. If you find that the Plaintiff, Charles Hawn, was negligent so as to contribute to the injuries which he sustained, then you will award him only one-half of the damages which you find he would otherwise be entitled to recover.

11. If you find that the Plaintiff, Charles Hawn, failed to observe the opening through which he descended into the lower hold and, if you further find that such failure was due to a lack of reasonable care on his part, and that such failure caused the accident in whole or in part, then the Plaintiff is guilty of contributory negligence and you will reduce any amount of damages which you may award him.

12. The Plaintiff may not recover from the Defendant simply because he sustained injuries while on board the Steamship "John Dickinson".)

(The third-party defendant submitted the following points for charge:

1. Under the law you cannot render a verdict in favor of the plaintiff directly against the third-party defendant, Haenn Ship Ceiling and Refitting Corporation.

2. Under the law and all of the evidence, your verdict as between the third-party plaintiff, Pope & Talbot, Inc. and the third-party defendant, Haenn Ship Ceiling and Refitting Corporation, must be in favor of the third-party defendant.

3. By reason of the provisions of the Longshoremen's and Harbor Workers' Act, the third-party plaintiff, Pope & Talbot, Inc. has no legal right to recover against the third-party defendant, Haenn Ship Ceiling and Refitting Corporation, any part of any sum which may be adjudged in favor of the plaintiff against Pope & Talbot, Inc. by way of contribution, indemnity or otherwise.

4. If you find that the plaintiff's injuries were due solely to the negligence of Pope & Talbot, Inc., as operators

of the vessel, in failing to furnish adequate lights, or in failing to have the vessel's holds and decks free from grain dust or grain, or in any other particular, then your verdict must be in favor of Haenn Ship Ceiling and Refitting Corporation.

5. If you find that the negligence of Pope & Talbot, Inc., as operator of the vessel, caused the plaintiff's injury, then and only then may you consider the question of whether Haenn Ship Ceiling and Refitting Corporation was negligent.

6. If you find from all the evidence that Haenn Ship Ceiling and Refitting Corporation was not negligent, then your verdict should be in favor of said Haenn Ship Ceiling and Refitting Corporation.

7. If you find that the conditions of work in No. 4 'tween deck, where the plaintiff was injured, were the usual and customary conditions expected to be encountered in performing the work of refitting this vessel, then your verdict must be in favor of Haenn Ship Ceiling and Refitting Corporation.

8. Haenn Ship Ceiling and Refitting Corporation was not responsible for the existence of grain or grain dust in No. 4 'tween deck and if you find that the plaintiff's injuries resulted solely from the presence of grain dust or grain in that portion of the vessel, then your verdict must be in favor of Haenn Ship Ceiling and Refitting Corporation.

9. If you find that the custom in the Port of Philadelphia is that lights for illuminating the holds of the vessel for use by grain fitters coming aboard shall be furnished by the ship and if you further find that the plaintiff's injuries were caused solely by the lack of adequate artificial illumination, then your verdict must be in favor of Haenn Ship Ceiling and Refitting Corporation.

10. If you find that the plaintiff's injuries were caused solely by his own negligence, then your verdict must be in favor of Haenn Ship Ceiling and Refitting Corporation.

11. If you find that the plaintiff is entitled to recover from Pope & Talbot, Inc. and if you further find that the plaintiff's injuries were caused in part by his own negligence in failing to look where he was going, or in any other particular, then you will reduce the amount to which he otherwise would be entitled by the percentage which you find that his own negligence contributed to his injury.)

* * *

(The jury returned to the court room at 7:15 P. M.)

THE CLERK: Will the jury please rise?

(The jury rose.)

THE CLERK: Members of the jury, have you agreed upon your verdict?

THE FOREMAN: We have.

THE CLERK: Members of the jury, hearken unto your special verdict as the court hath recorded it in the issue joined in this case wherein Charles Hawn is plaintiff, Pope & Talbot, Incorporated, is defendant and third-party plainti, and Haenn Ship Ceiling and Refitting Corporation, is third-party defendant; you say you find in favor of the plaintiff and assess the damages at $36,000, and in answer to the interrogatories propounded to you by the Court, your special verdict reads as follows:

"1. Was the S. S. 'John Dickinson' unseaworthy?"

Your answer to that is yes.

"2. Was Pope & Talbot, Inc., negligent?"

Your answer to that is yes.

"3. Was Haenn Ship Ceiling & Refitting Corporation negligent?"

Your answer to that is yes.

"4. Were both Pope & Talbot, Inc., and Haenn Ship Ceiling & Refitting Corporation negligent?"

Your answer to that is yes.

"5. Was plaintiff guilty of contributory negligence?"

Your answer to that is yes.

"6. If your answer to No. 5 is 'Yes', please state percentagewise the degree of such contributory negligence."

Your answer to that is seventeen and five-tenths per cent.

I think that is what those figures mean, seventeen and five-tenths per cent.

THE COURT: I think it is seventeen and a half on that.

THE CLERK: Seventeen and a half per cent.

And so say you all?

THE JURY: We do.

THE COURT: Is there any exception to be taken or objection to the recording of the verdict?

MR. LANDY: No, sir.

MR. MOUNT: What was the answer to number 8?

THE CLERK: Question number 8 was:

"If you find for the plaintiff, what is the full amount of the verdict without consideration of contributory negligence?"

And your answer to that was $36,000. And so say you all?

THE JURY: Yes.

THE COURT: Let the verdict be recorded.

Take your seats for a moment, members of the jury.

I just want to say this to you, I want to thank you for your service. You have been a real help, and I think this verdict of yours has reflected the sober, serious application that you have given to the matter before you, in my opinion it is a very sound, sober verdict.

I just want to express my thanks and my appreciation, because I understand this is the end of your service, you will not be required any longer.

THE CLERK: Mr. Mount mentioned number 8, I do not suppose there is any reason why we should not read number 7.

THE COURT: "Plaintiff."

THE CLERK: Question number 7 reads:

"Do you find for the plaintiff or for the defendant Pope & Talbot, Inc.?"

Your answer to that is, "Plaintiff."

• • •

MOTION OF HAENN SHIP CEILING AND REFITTING CORPORATION, THIRD PARTY DEFENDANT, FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR A NEW TRIAL OR FOR ENTERING JUDGMENT IN ACCORDANCE WITH SPECIAL VERDICT.

The Third Party Defendant, by its attorneys, Rawle & Henderson, prays as follows:

1. To enter judgment in favor of the Third Party Defendant, in accordance with its Motion for a directed verdict, ruling upon which was reserved at the time of trial.

2. To enter judgment in favor of the Third Party Defendant against the Third Party Plaintiff on the ground that the Longshoremen's and Harbor Worker's Compensation Act provides the exclusive remedy for all injuries covered by the Act and thereby precludes any recovery against the Third Party Defendant by contribution or otherwise in this section, Motion for a directed verdict on this ground having been made at the trial and decision thereon reserved by the Court.

3. To enter judgment in favor of the Third Party Defendant for the reason that there was not sufficient evidence of negligence on the part of the Third Party Defendant to be submitted to the jury.

4. In the event judgment is not entered in favor of the Third Party Defendant, as hereinabove prayed, that this Court shall grant a new trial for the following reasons, to wit:

(a) The learned Trial Judge erred in charging the jury in accordance with the 1st and 2nd Requests for Charge submitted by the plaintiff.

(b) The learned Trial Judge erred in refusing to charge the jury as requested in Requests for Charge Nos. 2, 3, 4, 8 and 9, submitted by the Third Party Defendant.

(c) The learned Trial Judge erred in denying the offer of the Third Party Defendant to prove before the jury that it had procured insurance for the payment of its obligations under the Longshoremen's and Harbor Worker's Act and in refusing its counsel the opportunity of arguing this fact before the jury.

(d) The learned Trial Judge erred in refusing the Motion for a mis-trial, by reason of the fact that after the jury was sworn, the members thereof were interrogated and instructed by another judge, in the absence of counsel.

(e) The Third Party Defendant reserved to itself the right to file additional Assignments of Error and reasons in support of its Motion after the testimony and the charge of the Court shall have been transcribed.

5. Without waiving the points heretofore raised, the Third Party Defendant prays that, if judgment notwithstanding the verdict shall not be entered in its favor and if the Court shall refuse a new trial, the Third Party Defendant moves the Court to enter judgment for the plaintiff against the original defendant, in the amount of fifty percent of the damages specially found by the jury in favor of the plaintiff, notwithstanding the jury's finding that the plaintiff was contributorily negligent to the extent of seventeen and one-half percent, for the reason that under general Admiralty Law, where both parties are at fault, the damages should be divided equally.

6. The Third Party Defendant further avers that the verdict of the jury against the Third Party Plaintiff and against the Third Party Defendant was against the law and the evidence and should be set aside and judgment should be entered in favor of the Third Party Defendant, or a new trial granted as to it.

RAWLE & HENDERSON,

By: THOMAS F. MOUNT,

Attorneys for Third Party Defendant.

MOTION OF POPE AND TALBOT, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF, FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR A NEW TRIAL, AND FOR MOLDING THE VERDICT.

The Defendant and Third-Party Plaintiff, Pope and Talbot, Inc., by its attorneys, Messrs. Krusen, Evans and Shaw, prays as follows:

1. To enter judgment in favor of Defendant and Third-Party Plaintiff, and against the Plaintiff, in accordance with its motion for a directed verdict, ruling upon which was reserved at time of trial.

2. To enter judgment in favor of Defendant and Third-Party Plaintiff and against the Plaintiff on the ground that under the evidence and law applicable thereto a verdict should have been directed in favor of the Defendant and Third-Party Plaintiff, and that its point for binding instructions should have been granted.

3. In the event that judgment be not entered in favor of the Defendant and Third-Party Plaintiff as hereinabove prayed, that this Honorable Court shall grant a new trial for the following reasons:

(a) The Court erred in its charge to the Jury.

(b) The Court erred in affirming the points for charge submitted by the Plaintiff.

(c) The Court erred in affirming the points for charge submitted by the Third-Party Defendant.

(d) The Court erred in denying the points for charge submitted by the Defendant and Third-Party Plaintiff.

(e) The Court erred in refusing Defendant and Third-Party Plaintiff's motion for the withdrawal of a Juror.

(f) The verdict was against the evidence and the law applicable thereto.

(g) The Court erred in instructing the Jury that unseaworthiness would constitute a ground of liability to the Plaintiff.

(h) The Defendant and Third-Party Plaintiff reserves the right to file additional assignments of error and reasons in support of its motion after the testimony and the charge of the Court shall have been fully transcribed.

4. Without waiving the points heretofore raised, the Defendant and Third-Party Plaintiff prays that if judgment notwithstanding the verdict not be entered in its favor, and if the Court shall refuse to grant a new trial, that the Court mold the verdict and enter judgment in favor of the Defendant and Third-Party Plaintiff and against the Plaintiff on the ground that Plaintiff's negligence, specially found by the Jury, bars any recovery by the Plaintiff.

5. In the alternative, and without prejudice to the points raised hereinabove, Defendant and Third-Party Plaintiff prays that the Court shall mold the verdict so as to provide that Plaintiff may obtain recovery against it only to the extent of fifty per cent of the damages specially found by the Jury by reason of the fact that the Jury also found specially that Plaintiff was contributorily negligent.

6. Without prejudice to any of the foregoing prayers, and in the alternative, Defendant and Third-Party Plaintiff prays that any judgment which may hereinafter be entered in favor of the Plaintiff and against the Third-Party Defendant be reduced in the amount of 17½ per cent, in accordance with the Jury's special finding that the Plaintiff was contributorily negligent to that extent.

7. Without prejudice to any of the foregoing prayers, and in the alternative, Defendant and Third-Party Plain-

tiff prays that judgment be entered in its favor and against the Third-Party Defendant for any sums which may be adjudged in favor of the Plaintiff and against the Defendant and Third-Party Plaintiff, on the ground that under the evidence and the law applicable thereto, any breach of legal duty owing to the Plaintiff which caused or contributed to the Plaintiff's injuries was a breach for which the Third-Party Defendant is primarily liable.

8. Without prejudice to any of the foregoing prayers, and in the alternative, Defendant and Third-Party Plaintiff prays that if any judgment be entered in favor of the Plaintiff and against the Defendant and Third-Party Plaintiff, that judgment be entered in favor of the Defendant and Third-Party Plaintiff and against the Third-Party Defendant for one-half of the amount of such judgment.

KRUSEN, EVANS AND SHAW,

By MARK D. ALSPACH,

Attorneys for Defendant and Third-Party Plaintiff, Pope & Talbot, Inc.

MOTION FOR DIRECTION TO ENTER JUDGMENT IN FAVOR OF PLAINTIFF AND AGAINST THE DEFENDANT.

Plaintiff, Charles Hawn, by his attorneys Messrs. Freedman, Landy and Lorry, respectfully represents:

1. That the trial of the above captioned matter was commenced before a judge and jury on February 14, 1950.

2. That on February 23, 1950, the jury returned a verdict in favor of plaintiff and against defendant Pope & Talbot, Inc.

3. That in answers to interrogatories submitted to the jury the said jury assessed the damages at $36,000.00, and found plaintiff guilty of contributory negligence to the extent of 17½%.

4. That there was no evidence adduced at the trial from which the jury could properly conclude that plaintiff was guilty of contributory negligence in any degree whatever.

WHEREFORE, plaintiff moves your Honorable Court to direct that judgment be entered in favor of plaintiff, Charles Hawn, against defendant, Pope & Talbot, Inc., in the sum of $36,000.00, together with interest and costs.

FREEDMAN, LANDY & LORRY,

By CHARLES LAKATOS,

Attorneys for Plaintiff, Charles Hawn.

DEFENDANT AND THIRD-PARTY PLAINTIFF'S ADDITIONAL ASSIGNMENTS OF ERROR AND REASONS IN SUPPORT OF ITS MOTION FOR A NEW TRIAL.

The Defendant and Third-Party Plaintiff, Pope & Talbot, Inc., by its attorneys, Messrs. Krusen, Evans & Shaw, respectfully presents the following additional assignments of error and reasons in support of its Motion for a new trial (numbers within parentheses refer to pages of the stenographer's transcript):

1. The Learned Trial Judge erred in refusing to permit the Third-Party Defendant to establish, during cross-examination of the Plaintiff, the amount of tax paid by the Plaintiff on his earnings for the years 1943, 1944, 1945, 1946 and 1947, which offer of proof was joined in by the Original Defendant (343-344).

2. The Learned Trial Judge erred in asking the Plaintiff whether on the day of the accident, he found an "unusual" amount of grain on the 'tween deck and hatch covers (346-347).

3. The Learned Trial Judge erred in denying the Original Defendant's Motion to strike the testimony of the witness Theodore Knopf with respect to an alleged custom of securing lights from the ship's personnel (383-391).

4. The Learned Trial Judge erred in sustaining the Plaintiff's objection to the Original Defendant's question to the Witness R. L. Thorn with respect to the established procedure as to the party from whom the Robert Cleaning Company, the Haenn Ship Ceiling and Refitting Corporation and Atlantic & Gulf Stevedores, Inc. were to take their orders when they did work for the United States Army (419-420).

5. The Learned Trial Judge erred in overruling the Original Defendant's objection to the Third-Party De-

fendant's question put to the witness F. A. Knopf wi respect to the custom in the Port of Philadelphia as who was to furnish artificial lighting needed in connecti with the work (461-462).

6. The Learned Trial Judge erred in overruling t Original Defendant's objection to the same type of questi as indicated in Paragraph 5, put by the Third-Party D fendant to the witness Theodore Knopf (465-466).

7. The Learned Trial Judge erred in instructing t Jury to forget about the contract between Haenn Sh Ceiling and Refitting Corporation and the United Stat Army, as between the Plaintiff and the Original Defenda (494-495).

8. The Learned Trial Judge erred in instructing t Jury on the question of seaworthiness and unseaworthine in various points throughout the charge, and particular in defining seaworthiness and giving illustrations there (495).

9. The Learned Trial Judge erred in stating to t Jury the nature of the defense presented by the Origin Defendant (496-497).

10. The Learned Trial Judge erred in instructing t Jury as to the extent of the burden of proof resting up the Plaintiff (499-500).

11. The Learned Trial Judge erred in instructing t Jury that "In this case we have to find either that the sh was unseaworthy or that there was some breach of du that Pope & Talbot owed to Mr. Hawn as a Foreman Ca penter on that day, because he can only recover a verd against Pope & Talbot" (501).

12. The Learned Trial Judge erred in instructing t Jury as to the concept of "present worth" (506-508).

13. The Learned Trial Judge erred in instructing t Jury as to a burden resting upon the Defendant to establi certain matters (520).

14. The Learned Trial Judge erred in refusing the Original Defendant's supplemental request to charge on the question of unseaworthiness as it related to the condition of the hatch boards, and in thereafter instructing the Jury in a manner contrary to the Original Defendant's request (521).

15. The Learned Trial Judge erred in refusing the Original Defendant's supplemental request to charge further on the question of proximate cause (521-522).

16. The Learned Trial Judge erred in refusing the Original Defendant's supplemental request to charge in a particular manner with respect to the concept of "present worth" (522).

17. The Learned Trial Judge erred in reading to the Jury the 9th point for charge submitted by the Original Defendant, and in including therein the reference to unseaworthiness as a basis of liability (515), notwithstanding that the Original Defendant had previously (487) been permitted to amend the said 9th point for charge by the omission of the phrase "or the unseaworthiness of the vessel".

KRUSEN, EVANS AND SHAW,

By MARK D. ALSPACH,
Attorneys for Pope & Talbot, Inc.

OPINION.

McGranery, *J.* July 17, 1951

This is a civil action brought by Charles Hawn, a ship carpenter, against Pope & Talbot, Inc., owner pro hac vice under a bare-boat charter of the S. S. "John Dickinson", to recover damages sustained as a result of a fall from the 'tween deck to the lower hold of the vessel while it was tied up at Girard Point, Philadelphia. The plaintiff was an employee of Haenn Ship Ceiling and Refitting Corporation (hereafter called "Haenn"), which had been engaged to prepare the ship to receive a cargo of grain by altering the grain feeders and erecting shifting boards. The defendant, Pope & Talbot filed a third-party complaint against Haenn and Atlantic & Gulf Stevedores, Inc. seeking full indemnity or contribution. The liability of the defendant was predicated on the ground of negligence and unseaworthiness and the liability of the third-party defendants was predicated upon negligence.

Before opening the case to the jury, the parties in open court stipulated and agreed that the action should be dismissed as to Atlantic & Gulf Stevedores, Inc.

The case was submitted to the jury with interrogatories under Rule 49. The jury, in response to the interrogatories, found: (1) the S. S. "John Dickinson" unseaworthy, (2) the defendant Pope & Talbot negligent, (3) the third-party defendant Haenn negligent, (4) the plaintiff contributorily negligent to the extent of 17.5%, and (5) a verdict for the plaintiff against the defendant in the amount of thirty-six thousand dollars ($36,000.00) before any deduction for contributory negligence.

All three parties have filed post-trial motions. (1) The plaintiff moves for an entry of judgment in his favor, against the defendant, for the full amount of thirty-six thousand dollars ($36,000.00), without any deduction for contributory negligence, on the ground that there is no evidence to support such finding of contributory negligence.

(2) The defendant, Pope & Talbot, moves for judgment notwithstanding the verdict, for a new trial, and for the entry of judgment in its favor on the ground that the plaintiff's contributory negligence bars any recovery. If judgment is to be entered for the plaintiff, however, then defendant moves that the verdict be molded to reduce plaintiff's recovery by 50% for contributory negligence. The defendant further moves for judgment awarding it full indemnity from the third-party defendant for any recovery awarded plaintiff; or, in the alternative, for judgment awarding it contribution from the third-party defendant in the amount of one-half the plaintiff's recovery. (3) The third-party defendant, Haenn, moves for judgment against the third-party plaintiff on the ground that the Longshoremen's and Harborworkers' Compensation Act, 33 U. S. C. A. 901 et seq., precludes any recovery over by Pope & Talbot. Haenn also moves for a new trial and for a molding of the verdict to reduce the plaintiff's recovery by 50% on account of his contributory negligence.

Some of the defendant's assignments of error in support of its motion for a new trial will be noted first. The defendant complains that the court dealt almost exclusively with the question of unseaworthiness as a ground for liability, saying very little about negligence. On the contrary, the court did instruct fully on the issue of negligence, and the jury deliberated on that issue, returning a special finding of negligence. The defendant's objection actually bears upon his contention that the issue of unseaworthiness did not belong in the case, a problem considered in connection with the discussion of the defendant's motion for a judgment notwithstanding the verdict.

The defendant urges as error the court's charge to the jury that they ignore the matter of contract between the defendant and the Army, to whom the ship was under time charter, and who actually contracted for the services of Haenn, plaintiff's employer. Here, it must be stated that the defendant was the owner of the vessel, pro hac

vice, and under a non-delegable duty to maintain the ship in a seaworthy condition. The shipowner must be deemed to have consented to the performance of the services aboard the ship by Haenn, and upon this consent is predicated the liability for unseaworthiness. Seas Shipping Co. v. Sieracki, (328 U. S. 85). Moreover, regardless of any contract, a shipowner, like anyone else, is liable for his own acts of negligence.

Two errors are assigned to the charge on the burden of proof. The first error contended was that the court indicated that after the plaintiff had supported his case with evidence, a burden might be shifted to the defendant. This is inaccurate since it was not said, or meant, that the burden of proof actually shifted. The intention was merely to convey to laymen the point that after the plaintiff had presented a convincing case, then the defendant had the burden of presenting evidence to the contrary. The technical aspect of the burden of proof was correctly given to the jury by reading to them the relevant point for charge submitted by defendant's counsel.

The second error assigned in connection with the burden of proof is that the court failed to instruct on causal connection, in certain parts of the charge. It is true that in discussing the grounds for liability, the court, in one or two comments, did not immediately connect liability with causation. Nevertheless, the problem of proximate cause was clearly discussed in other parts of the charge, including a point submitted by the defendant and read to the jury. Reading the charge as a whole, it is clear tha the jury could not have been misled on the issue of causation.

The defendant points out a sentence in the charge which it complains, has the effect of practically directing a verdict for the plaintiff. The sentence was an explanation of the fact that the plaintiff could recover only against the defendant, no recovery against the third-party defendant being possible, and consequently, in order to find for

the plaintiff, the jury had to find negligence or unseaworthiness attributable to the defendant. In talking to the jury, however, the court omitted to state explicitly the conditional words qualifying the jury's duty to find negligence or unseaworthiness. Yet the words of condition—"in order to find for the plaintiff"—were certainly implicit in the sentence as the court spoke to the jury. In any event, a full reading of the charge renders inconceivable the notion that a directed verdict was indicated, and it is beyond reason to assume that the jury isolated a single sentence from context to reach a conclusion foreign to the sense of the entire charge.

Thorough examination of the defendant's assignments of error and of the third-party defendant's assignments of error fail to prove the necessity for a new trial. Accordingly, the motions for a new trial will be denied.

In support of its motion for a judgment notwithstanding the verdict, the defendant Pope & Talbot urges that it owed no duty to the plaintiff, a carpenter in the employ of a shore-side company, to provide a seaworthy ship, and that if it did owe him that duty, there was no evidence of unseaworthiness. The court is of the opinion that under the decision of Seas Shipping Co. v. Sieracki, (328 U. S. 85), the doctrine of seaworthiness applies to the plaintiff, whose duties had a direct relation to the proper loading and handling of the ship's cargo in preparation for a voyage. Sulovitz v. U. S., (64 F. Supp. 637); Eagle Indemnity v. U. S. Lines Co., (86 F. Supp. 949). Whether there was any evidence of unseaworthiness, however, is a close question. The evidence reveals three possible grounds for a finding of unseaworthiness: (1) the slippery condition of the deck and hatch covers because of the presence of grain dust deposited by a partial grain-loading; (2) inadequate lighting in the 'tween deck section of the hold where the accident occurred; and (3) the absence, for some time prior to the accident, of a hatch cover at the point where the plaintiff fell, the evidence being that on the pre-

ceding day, ship cleaners had noticed missing hatch covers in the vicinity. Under the recent Third Circuit decision of Cookingham v. U. S., (184 F. 2d 213), noted 19 Geo. Wash. L. Rev. 341, the first two conditions may not be described as conditions of unseaworthiness. The slipperiness of the decks because of grain dust from a loading was merely a transitory unsafe condition resulting from the normal use and operation of the ship, involving no inherently defective appliance. The same may be said of the lighting conditions. It is difficult to determine whether the absence of a hatch cover for a period of a day prior to the accident is merely a transitory condition, without evidence of how long the condition actually existed. Cf. Judge Biggs' dissent in the Cookingham case. In the instant case, the court concludes that the evidence would warrant a finding of unseaworthiness.

In any event, a finding of negligence, a separate and independent ground of liability, was justified. The evidence of the absence of a hatch cover for about a day preceding the accident is sufficient to charge the defendant with constructive notice of the fact. And in the circumstances of grain loading, with slippery footing to be expected, a conclusion of negligence on the defendant's part is not unreasonable. Pope & Talbot's motion for a judgment notwithstanding the verdict, therefore, will be denied.

On the other hand, contrary to the plaintiff's contention, there was ample evidence to warrant the finding of contributory negligence. It was testified that there was sufficient light to do the work which had to be done, though perhaps with some difficulty. The work had, in fact, been in progress for some time. Consequently, the jury was justified in concluding that there was sufficient light for the plaintiff to have seen that a hatch cover was missing. Hence, notwithstanding the slippery footing conditions, of which plaintiff, an experienced hand at working on grain ships, could not have been unaware, it was reasonable for

the jury to conclude that in the exercise of due care, he could have avoided the discernable danger. That he did not avoid it indicates contributory negligence, and the jury's finding to that effect is well substantiated by the evidence. The plaintiff's motion for the entry of judgment without regard to contributory negligence will be denied.

The defendant's position on contributory negligence is that it is a complete bar in a civil action, notwithstanding the maritime nature of the action. Belden v. Chase, (150 U. S. 674); Johnson v. U. S. Shipping Board, (2 Cir., 24 F. 2d 963) (reversed on other grounds); In re Pennsylvania R. R. Co., (2 Cir., 48 F. 2d 559). The issue raised suggests the whole problem of uniformity in the maritime law. See, for a discussion, Stevens, "Erie R. R. v. Thompkins and the Uniform General Maritime Law", (64 Harv. L. Rev. 246).

The court does not concede the present validity of the doctrine of the Belden v. Chase line of cases. In those cases, the problem of contributory negligence was treated as one of procedure and, therefore, lex fori (in the Belden case, however, merely by way of dictum). In conflict of laws, contributory negligence is part of the substance of the "right". Palmer v. Hoffman, (318 U. S. 109); Restatement, Conflict of Laws, Sec. 385. The court, In re Pennsylvania R. R. Co., restated the familiar rules of conflict of laws, but concluded that, as between a court of admiralty and a common law court, the question is treated as one of procedure, "though in general the law is otherwise." Under the philosophy of Erie R. R. v. Tompkins, (304 U. S. 64), the question of whether contributory negligence is substantive or procedural in nature depends on whether "it significantly affects the result of a litigation" for a federal court, at law, to disregard a rule of the maritime law which would be controlling in an action upon the same claim by the same parties in an admiralty court. See Guaranty Trust Co. v. New York, (326 U. S. 99, 109). In admiralty, contributory negligence

does not wholly bar recovery. The Max Morris, (137 U. S. 1). To disregard the admiralty rule in an action on the "law side" of the court would "significantly affect the result" of this litigation, and in that sense contributory negligence is substantive in nature.

The Supreme Court has re-emphasized the "necessary dominance of admiralty principles in actions in vindication of rights arising from the admiralty law. Belden v. Chase • • • an 1893 decision which [was relied] upon as establishing a contrary rule, has never been thus considered in any of the later cases cited." Garrett v. Moore-McCormack, (317 U. S. 239, 244). The injury to the plaintiff involves a maritime tort. Atlantic v. Imbrovek, (234 U. S. 52); Robbins Dry Dock v. Dahl, (266 U. S. 449); Robinson on Admiralty, pp. 106-107. His rights are rooted in the general maritime law, and his right to be free from the bar of contributory negligence imposed by the Pennsylvania local rule inheres in his cause of action just as deeply as did the right of the petitioner in the Garrett case to be free from the local Pennsylvania rule on the burden of proof inhere in that cause of action. "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right originates." Garrett v. Moore-McCormack, supra, p. 245. Thus, in a suit in a State court on a cause of action originating in the general maritime law, the State court was obliged to look to the maritime law in determining the "substantial rights of the parties." Similarly, a federal district court, when its diversity jurisdiction is invoked in a maritime dispute, looks to the maritime law rather than to the State law. Seas Shipping Co. v. Sieracki, supra; Cannella v. Lykes Bros. S. S. Co., 2 Cir., (174 F. 2d 794). To apply the bar of contributory negligence "would be inconsistent and an impractical refinement • • • in a system of law which maintains the comparative negligence rule to the

fullest extent." Socony-Vacuum Oil Co. v. Smith, (305 U. S. 424, 432).

I reach the conclusion, therefore, that since the plaintiff's suit rests on asserted rights granted by the federal law, the protection of his substantial rights demands the application of the maritime law. Accordingly, the defendant's motion for the entry of judgment in its favor because of the plaintiff's contributory negligence will be denied.

Both the defendant and the third-party defendant contend that if the general maritime law of contributory negligence is applicable, then the damages should be halved rather than assessed under the theory of the percentage of fault which the respective parties contributed to the injury. The general maritime rule, in property damage cases, is to assess the negligent parties equally. Robinson on Admiralty, p. 857; see American Stevedores v. Porello, (330 U. S. 446, 458). In personal injury cases, The Max Morris, (137 U. S. 1), decided that contributory negligence was not a complete bar to recovery, but the court left unsettled the method of the division of damages. In practice, courts have not generally split the damages half and half. Robinson, p. 91; Guerrini v. U. S., (2 Cir., 167 F. 2d 352); Kreste v. U. S., (2 Cir., 158 F. 2d 575); Strika v. Holland American Lines, (90 F. Supp. 534); Portel v. U. S., (85 F. Supp. 458); Badalamente v. U. S., (67 F. Supp. 575), modified, (2 Cir., 160 F. 2d 422); cf., Stokes v. U. S., (2 Cir., 144 F. 2d 82, 87). And the decisions are not lacking in language indicating the existence of the comparative negligence doctrine in admiralty. American Stevedores v. Porello, supra, p. 458; Socony-Vacuum Oil Co. v. Smith, supra, p. 431-432; Stogard v. France & Canada S. S. Corp., (2 Cir., 263 F. 345); Coal Operators Cas. Co. v. U. S., (76 F. Supp. 681, 683); The Henry S. Grove, (22 F. 2d 444, 447). Inasmuch as the jury has assessed the comparative negligence between plaintiff and defendant, this court will give effect to that assessment in accordance with a rule that appears to have the sanction of practice and opinion. Consequently, the motions to

reduce the plaintiff's recovery by 50% of the jury's full verdict will be denied.

In support of its motion for judgment against the third-party plaintiff, Haenn, the third-party defendant, contends that under the terms of the Longshoremen's and Harbor-workers' Compensation Act, its sole liability to an injured employee is to secure payment of compensation to him; and, having met this liability it may not be required to pay him further compensation indirectly by being compelled to contribute to the third-party plaintiff on account of damages recovered from it by the injured employee. The problem has been settled in this Circuit by the recent decision of the Court of Appeals in Baccille v. Halcyon Lines, (187 F. 2d 403). The employer-third-party defendant, having been found guilty of negligence, is liable to contribution to the defendant-third-party plaintiff, but only up to the limit of the employer's compensation liability. Compare American Mutual Liability Co. v. Matthews, (2 Cir., 182 F. 2d 322); United States v. Rathschild Int. Stevedoring Co., (9 Cir., 183 F. 2d 181). Although the jury was not asked to find comparative negligence between Pope & Talbot and Haenn, they are "mutual wrongdoers", and their acts of negligence were highly analogous. Each was negligent in an almost identical manner in contributing to the cause of plaintiff's injury. Therefore, it seems appropriate that they contribute equally, unless an equal contribution should exceed the limit of Haenn's compensation liability. Accordingly, Haenn's motion for judgment will be denied, and Pope & Talbot's motion for full indemnification will likewise be denied. Pope & Talbot's motion to require Haenn to contribute one-half the judgment entered for plaintiff against Pope & Talbot will be granted insofar as it can be consistently with Haenn's compensation liability limitation.

Assessing 17.5% of the thirty-six thousand dollars ($36,000.00) verdict against the plaintiff because of his contributory negligence as found by the jury, then 82.5% of

the thirty-six thousand dollars ($36,000.00) verdict, or the sum of twenty-nine thousand seven hundred dollars ($29,700.00) will be the measure of the plaintiff's recovery against the defendant. The third-party defendant must contribute one-half of that sum, or fourteen thousand eight hundred fifty dollars ($14,850.00), to the defendant, unless the limit of his workmen's compensation liability is a smaller amount, in which event the smaller amount is the measure of the contribution. It does not appear on the record what the limit of Haenn's compensation liability is, nor does it appear in what amount the plaintiff has received compensation payments to date. If he has received such payments, the amount which the third-party defendant contributes to the defendant must be correspondingly reduced, and so must the amount which the plaintiff recovers from the defendant. The parties will submit an appropriate order in accordance with this opinion.

MEMORANDUM RE FINAL JUDGMENT.

McGRANERY, *J.* September 28, 1951

Since filing opinion in this case on July 17, 1951 a further hearing has been held and all parties concerned have moved the Court for entry of final judgment. At that hearing, additional evidence was introduced showing that Haenn Ship Ceiling & Refitting Corp., Third Party Defendant, notwithstanding the plaintiff's election to sue, has continued paying compensation at the rate of Twenty-Five Dollars ($25.00) per week as provided by the Longshoremen's and Harbor Workers' Act and that as of September 24, 1951 there will have been paid in compensation a total of Five Thousand Fifty Dollars ($5,050.00). It further appears that the Third Party Defendant has paid for medical and hospital expenses the sum of Eight Hundred Thirty-One Dollars and Thirty-Five Cents ($31.35) and that the plaintiff has agreed, if and when his judgment against the original defendant is collected, to repay to the Third Party Defendant all sums paid by it to him as compensation and as well the sum of Eight Hundred Thirty-One Dollars and Thirty-Five Cents ($831.35) for medical and hospital expenses. It is further stipulated that the limit of the Third Party Defendant's obligation to pay compensation under the Act is Seven Thousand Five Hundred Dollars ($7,500.00). Upon consideration of this evidence and the law applicable to the case, the original opinion, insofar as the manner in which it provides for the entry of judgment, is hereby modified, and that judgment is entered as follows:

Judgment is entered in favor of Charles Hawn, plaintiff, against Pope & Talbot, Inc. in the amount of Twenty-Nine Thousand Seven Hundred Dollars ($29,700.00) with interest and costs; and in favor of Pope & Talbot, Inc. against Haenn Ship Ceiling & Refitting Corp., Third Party Defendant, in the amount of Eight Thousand Three Hundred Thirty-One Dollars and Thirty-Five Cents ($8,331.35) with interest and costs, with leave to the Third Party Defendant to move for modification of the judgment against it should it hereafter appear that for any reason it may be relieved from paying the full limit of its obligation for compensation under the Longshoremen's and Harbor Workers' Act.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EXAMINATION OF JURY PANEL DRAWN FOR SERVICE BEGINNING FEBRUARY 13, 1950.

Before HONORABLE THOMAS J. CLARY, *J.*

Philadelphia, Pa., Wednesday, February 15, 1950.

(The entire panel of jurors was summoned before the Court at 1:55 P. M.)

THE COURT: Ladies and gentlemen, it has come to the attention of the Court that certain people have, prior to your service as jurors, taken, shall be say, the time and trouble to investigate you. I want to say at the outset that an investigation of a jury panel is not in and of itself improper. I know it happens in the city of Philadelphia that litigants sometimes and the district attorney's office in Philadelphia do go around to find out who the jurors are to be and something about them. The purpose of that is to select intelligently jurors when cases are called for trial.

However, it appears to us, the judges of this court, that perhaps the bounds of propriety have been passed in some instances, and I would like to know from this jury panel whether any of you have been directly approached and questioned before you came into this court to serve as jurors.

JUROR NO. 34: (William R. Forrestal, 4308 Comly Street, Philadelphia 24) Your Honor, I received a telephone call from a gentleman who identified himself as a Mr. Durant. He said he represented Charters Associates in the Packard Building. He asked me a number of questions.

THE COURT: Are you now serving on any jury panel?

MR. FORRESTAL: I was called for two and rejected. Today I was chosen for an alternate on a jury.

THE COURT: Within the next day will you please go to my chambers at room 3050—that is just upstairs here on the east corridor—and I would like you to make a statement to my secretary, Miss Daly, if you would, which she can take stenographically, and that is the type of information I want, and we will determine what we will do after that. Will you make it a point to do that, Mr. Forrestal, perhaps a few minutes before you go on service tomorrow or during your term of service and as soon as you can. Would you do that?

MR. FORRESTAL: Yes, sir.

THE COURT: Thank you very much.
I see a lady in the back.

JUROR No. 18 (Mrs. Helen I. DeHaven, 100 Sunset Avenue, Ephrata, Lancaster County): Mr. Murphy called my home. I wasn't there to take the call, and he requested my mother——

THE COURT: A Mr. Murphy?

MRS. DEHAVEN: Yes.

THE COURT: Would you also please talk to my secretary, Miss Daly, at the same room number.

MRS. DEHAVEN: Yes.

THE COURT: Thank you, Mrs. DeHaven.

JUROR No. 65 (Mrs. Madeline C. MacIver, Birmingham Township, Chadds Ford, Chester County): My name is Mrs. Robert MacIver, Chadds Ford, Your Honor.

THE COURT: Mrs. Madeline C. MacIver, No. 65 of the jury panel.

MRS. MACIVER: Yes, sir.

THE COURT: I also want you to see my secretary, but only after this case is concluded.

JUROR No. 75 (Mrs. Elizabeth C. Monahan, 5368 N Sydenham Street, Philadelphia 41): I was also visited by that Mr. Durant.

THE COURT: Mr. Durant visited you?

MRS. MONAHAN: Yes.

THE COURT: Is he from Charters Associates?

MRS. MONAHAN: Yes.

THE COURT: In the Packard Building.

All right, Mrs. Monahan, I will ask you to just stop i and make that statement to my secretary so that we wi have it.

JUROR No. 48 (Mrs. Anna S. Hoey, 3242 N. Broa Street, Philadelphia 40): I didn't get the man's name tha came to see me. I understood that he came from a lawyer association or something connected with lawyers, and h asked me a few questions as to how long I lived there an what my occupation was, what my husband did, what m children's names were, what their husbands—where the were employed.

THE COURT: He approached you directly?

MRS. HOEY: Yes.

THE COURT: You didn't get his name?

MRS. HOEY: No.

THE COURT: Thank you, Mrs. Hoey.

Perhaps if I get this information here, I won't hav to ask you to come up.

JUROR No. 80 (Mrs. Agnes A. Noon, 849 Anchor Stree Philadelphia 24): I don't remember what the man's nam was, but he called me on the telephone and asked me simil questions to this lady. He talked to me for about twen minutes. He asked me everything.

THE COURT: You didn't get his name, though, Mrs. Noon?

MRS. NOON: No, I didn't.

JUROR No. 28 (Laurence W. Estey, R. D. 1, Ephrata, Lancaster County): A Mr. Murphy called me on the phone asking a lot of questions.

THE COURT: The same Mr. Murphy that called the other gentlemen and asked a lot of questions?

MR. ESTEY: That is right.

THE COURT: Thank you.

JUROR No. 23 (Robert T. Dynan, 540 Eighth Avenue, Bethlehem, Lehigh County): I received a telephone call from a man whose name I believe was Mr. Durant. I think it was probably the same as those other gentlemen mentioned. He said he represented an association of attorneys and that the reason for the call was to secure information which would be useful in saving time in picking the jury.

THE COURT: What kind of questions did he ask you?

MR. DYNAN: Well, he asked about the same as these other people have described—in other words, where I worked, where I was employed, whether or not we owned our home, and questions of that kind.

THE COURT: Did he ask you anything about whether you were in favor of or against any particular people?

MR. DYNAN: No.

THE COURT: All right, thank you very much.

JUROR No. 94 (Mrs. Ada M. Schiessing, 4603 Vista Street, Philadelphia 36): I was called, and the questions were about the same as these other folks.

THE COURT: Did the man give his name?

MRS. SCHIESSING: Yes, but I don't recall. He said he represented the attorneys' association and was making a further investigation.

THE COURT: All right, thank you, Mrs. Schlessing.

JUROR No. 51 (Mrs. Bertha Hummel, 2626 N. Franklin Street, Philadelphia 33): A man came to see me. I didn't know his name.

THE COURT: What questions did he ask you? What type of questions?

MRS. HUMMEL: He asked me my name and what my husband worked at, what my sister and her husband worked at.

THE COURT: And he didn't give you his name?

MRS. HUMMEL: No.

THE COURT: It was strictly in line with your service on this jury that he did question you and questioned you directly?

MRS. HUMMEL: Yes.

THE COURT: Thank you, Mrs. Hummel.

JUROR No. 115 (Mrs. Lydia M. Yost, 121 Hunter Street, Tamaqua, Schuylkill County): A gentleman called from Philadelphia. I couldn't give you his name, but he was there quite a while, and he wanted to know what my husband did and what I did, and my boys—got all the information about my family.

THE COURT: And talked to you directly?

MRS. YOST: Yes, directly.

THE COURT: He said he was from Philadelphia?

MRS. YOST: He said he lived on North Broad Street. I don't know who it was.

THE COURT: Thank you, Mrs. Yost.

JUROR No. 37 (John W. Garvin, 4037 Seventh Street, Philadelphia 40): A man came to my house and he asked my name and address. Of course, he had the address, and he said he was there in regards to jury duty. He asked me

my politics. He asked me if I believed in unions. He also asked me if I went to church and what church.

THE COURT: What did he give as his name or organization?

MR. GARVIN: He didn't give no name. He said he was there in regards to jury duty.

THE COURT: And he approached you directly?

MR. GARVIN: He came right in the house and was there for half an hour. I could describe the man if I seen him.

THE COURT: All right, thank you, Mr. Garvin. Thank you very much.

MR. GARVIN: I told him I was retired. Then he wanted to know what I worked at formerly. He put it all down on a paper.

THE COURT: Thank you, Mr. Garvin.

JUROR No. 104 (James Veal, Jr., 332 N. 61st Street, Philadelphia 39): A man came to my house. I don't remember his name. It was on Sunday afternoon. He wanted to know if I was in the union and how I felt about a large corporation and a small man and if I was a Communist, what politics I belonged to. He said I didn't have to state that. And a whole lot of other questions about my family.

THE COURT: Did he leave his name or the organization which he represented?

MR. VEAL: He said a lawyers association, the same as these others.

THE COURT: Thank you, Mr. Veal.

JUROR No. 108 (Mrs. Anna M. Widdicombe, 121 North Green Street, Nazareth, Northampton County): A man came to my house on Saturday afternoon and he asked me questions like that, my religion, politics, how many brothers

and sisters I had, and where the men worked, if I believed in unions, if I had any communistic leanings, and what church I went to.

THE COURT: Did he give you any impression that he was from the court?

MRS. WIDDICOMBE: Yes. As soon as he came in he said, "I know that you were selected for jury duty in Philadelphia."

THE COURT: Did you have any feeling that he was from the court?

MRS. WIDDICOMBE: Yes. I thought that it was something a little different, but he didn't say, and I didn't get his name, and he had the information all down in the book.

JUROR No. 3 (Mrs. Luta M. Baughman, 118 East King Street, Malvern, Chester County): A gentleman called at my door and asked me if I was on a federal jury, and I said yes. He came in, and he asked me questions, and finally he asked me if I believed in the union, and I gave him a very evasive answer. He also asked me about my politics.

THE COURT: Thank you, Mrs. Baughman.

JUROR No. 114 (Walter E. Yerger, 18 E. Philadelphia Avenue, Boyertown, Berks County): A man came to my house. I wasn't home. He asked my daughter whether I belonged to the union, and a bunch of other questions. He also mentioned to her that there was two women serving from Reading. He asked about the union business, whether I was broadminded, and what I worked at, what is my brothers' and sisters' addresses.

THE COURT: But he didn't approach you directly? He talked to your daughter?

MR. YERGER: He asked for me and talked to my daughter.

THE COURT: Thank you, Mr. Yerger.

JUROR No. 29 (Mrs. Della P. Feder, 4 Elder Avenue, Yeadon, Delaware County): I had a call. I believe the gentleman's name was Durant. I wasn't in a very good humor. He said he would like to ask me a few questions. He knew I was a member of the jury in the federal court.

I said, "Isn't this a bit irregular? I have served on the county and federal court on a couple of occasions, and I never had any questions like this before."

He said, "Oh, no, this is being done," and I said, "I am very sorry. I don't think it is a regular procedure," and he didn't get a chance to ask questions.

My husband happened to be home at the time, and he was ill, and he picked up the phone and he said, "What certain questions do you want to ask?"

He said, "Well, do you own an automobile? Do you drive an automobile? Do you own your own home?" Questions like that, and that is as far as he got.

JUROR No. 70 (Mrs. Mary E. McCoy, 126 N. Paxon Street, Philadelphia 39): A man came to my home a week ago last Sunday. I was out. He asked my mother——

THE COURT: He did not see you directly?

MRS. MCCOY: No.

THE COURT: The same type of questions that were asked of the others?

MRS. MCCOY: Yes.

THE COURT: All right, Mrs. McCoy, thank you very much.

JUROR No. 93 (Joseph J. Schickling, Jr., 2115 North 63rd Street, Philadelphia 31): A man came to my home on a Sunday afternoon. I wasn't there, and he questioned my wife along the same lines as this.

THE COURT: He did not talk to you directly?

MR. SCHICKLING: No, he talked with my wife and my wife's nephew and asked all about me.

THE COURT: Did your wife get his name?

MR. SCHICKLING: It sounded something like Dorman or Durant or something.

THE COURT: Thank you, Mr. Schickling.

JUROR No. 92 (Mrs. Angela M. Schiavo, 2021 S. Colorado Street, Philadelphia 45): I was at work and a man called at my home and questioned my son. He asked him all sorts of questions. My son says he didn't know how to answer half of the questions he asked. I wasn't at home at the time.

THE COURT: But he did come to your home?

MRS. SCHIAVO: Yes, he did.

THE COURT: Thank you very much, Mrs. Schiavo.

JUROR No. 47 (Robert D. Hicks, 215 Powell Avenue, Upper Darby, Delaware County): I was not approached directly, but they came to my parents' home, which I had listed as my home at that time, and asked a number of questions, personal and otherwise.

THE COURT: O. K., Mr. Hicks.

JUROR No. 16 (Carl L. Coomes, Nottingham, Chester County): He only called me on the telephone, and he said he was in Kennett Square and he didn't have time to come on up. He wanted to know how many children I had, what church I went to, and how much ground I had. He wanted to know the number of acres of ground, and a few questions like that. He wanted to know if I believed in unions. He didn't ask me too many questions.

THE COURT: Thank you, Mr. Coomes.

JUROR No. 64 (William E. Loughery, 46 Wyneva Street, Philadelphia 44): I was called on the telephone by this Mr. Durant.

THE COURT: Mr. Durant talked to you over the telephone and directly?

MR. LOUGHERY: He identified himself as representing a lawyers association. He said he knew I was a prospective juror and he wanted to ask a few questions, and he proceeded to ask questions about myself and my family.

THE COURT: Thank you, Mr. Loughery.

JUROR No. 98 (Mrs. Mae E. Sherman, 3308 Orchard Place, Laureldale, Berks County): A gentleman came to the house. I have an apartment in front of the house, and he came there, and, of course, he said, "Mrs. Sherman is in the rear," so he came to the rear. He said, "Are you Mrs. Sherman, Mrs. Mae E. Sherman?"

I said, "Yes."

He said, "Well, I am interviewing the jury people that were selected for the federal court at Philadelphia."

I don't remember his name, but he asked me all kinds of questions.

THE COURT: What did you understand that he was?

MRS. SHERMAN: Well, the way he stated, he said he is there just for the purpose of interviewing the jurors. He said that is all he does.

THE COURT: Did he give you any idea that he had any official position with the court?

MRS. SHERMAN: Well, I said, "How did you know?"

He said, "Well, here is your name," and he got the list of the names, you know, and even next to my name was the name of Shalter on the jury list, and he asked me, "Would you know this party?"

I said, "Just a minute. That is Reading." I said, "I will get my phone book if it will help you any, and perhaps you could call him."

He said, "That will be very kind of you."

So I called the Shalters, but they had no reference at all to this party. They didn't even know who this was.

Then he says, "Thank you so very kindly for the information."

And then he said, well, he was sent here by the Philadelphia court to interview me.

THE COURT: Sent by the Philadelphia——

MRS. SHERMAN: That is what he said, to interview the different jurors.

THE COURT: Sent by the court?

MRS. SHERMAN: He said that is his job. He said, "As soon as I get through with one jury panel I start on the next jury panel. That is all I do. I come from Philadelphia."

THE COURT: Thank you very much.

Is there anybody else that was approached directly?

JUROR No. 50 (Mrs. Eluda R. Hughes, 1925 W. Venango Street, Philadelphia 40): He came to my door on Friday night about a quarter after four when I was making dinner, and I said, "Who are you?"

He said, "I understand you are supposed to be on the jury next week."

I said, "I am."

"Well," he said, "may I come in?"

I said, "Well, I am making dinner."

He said, "Just a few minutes."

So he asked me where I was born and where I go to church and what my husband did, if I believed in unions, and he said, "You are not a Communist, are you?"

THE COURT: Did you get his name?

MRS. HUGHES: When he was ready to leave I said, "What is your name?" But I didn't get it.

THE COURT: Thank you, Mrs. Hughes.

Is that the same experience you had, Mrs. MacIver?

MRS. MACIVER: (Juror 65) Yes, Your Honor.

THE COURT: And you, Mrs. Esmonde?

MRS. ESMONDE: (Juror 27) Yes.

THE COURT: Who else had the same experience?

JUROR No. 40 (G. Raymond Greeby, 119 Highland Avenue, Cynwyd, Montgomery County): I had a phone call to the house. The gentleman said he represented an association of lawyers, and he asked me if I own my home and my attitude toward unions or large type of corporations.

THE COURT: The same type of questions?

MR. GREEBY: Yes.

THE COURT: Did he give a name?

MR. GREEBY: He gave a name, but I asked him twice. I couldn't understand very well. I wouldn't say whether it was Durant or not. He said he was from an association of lawyers.

JUROR No. 20 (John T. Dolde, 59 W. Plumstead Avenue, Lansdowne, Delaware County): A man stopped at my house when I wasn't there, and he was told to go to the office, and he stopped at my office and we had a little chat together. He represented himself to be from a reporting company. He said he was trying to obtain some background for those who were serving on the jury. The direct question he asked me that I recall is, he wanted to know what organizations I was connected with.

THE COURT: But he did approach you directly?

MR. DOLDE: He came to my office.

THE COURT: Thank you, Mr. Dolde.
Was anybody else approached directly?

JUROR No. 84 (William D. Potts, 608 Main Street, Hellertown, Northampton County): I was called on the telephone by a man whose name I am not sure of. I think it was Durant. I think he asked me all the questions that he asked anyone else, but I was certainly of the opinion that he was connected with the court in some fashion, be-

cause he started out by saying, "Here are a couple of questions that you will answer." He just started out with my name and address. After two or three questions he said, "Here are some other questions it is not necessary for you to answer if you don't want to."

THE COURT: He gave you the impression he was from the court?

MR. POTTS: Yes, and when he was done asking questions, he said, "Now, are there any questions you have?"

I asked him a couple of questions and he answered them with what appeared to be a truthful manner.

THE COURT: Thank you, Mr. Potts.

JUROR No. 74 (Gerald I. Miner, 137 E. Main Street, Ringtown, Schuylkill County): I was not contacted in person, but a man spent a day attempting to contact me at my home. Failing to find me, he called on one of my neighbors, who generously supplied all the information. Whether he intended to create the illusion that he was representing the court or not, I do not know, but she got the impression he was sent there by the court.

THE COURT: Thank you, Mr. Miner.

Was there anyone else approached directly?

(No response.)

Well, it won't be necessary for those that I asked earlier to come up to the office. I think that Mr. Schuman, who has been very patiently listening and taking down everything that was said, will give me a report on this, and I think that this is the first step in starting to find out what this is all about and the underlying reasons.

You probably during your term of service won't hear any results, but it is our present thought that while jury investigation is a perfectly legitimate thing, that a direct approach to a prospective juror is not, and, consequently, I believe that we will from here in stop this sort of thing.

Nobody was sent out from the court. Any communications you get from the court will be official and on official stationery, or there will be somebody like the two gentlemen in the back of the room, the chief deputy marshal and one of his assistants, who will identify themselves properly as United States officials. To them and them only are you to accord any information, and not to these people who come around to investigate you, so-called. They are not from the court. They can not identify themselves as from the court, and we feel it is improper, and we intend to do something about it.

I am sorry to take up your time, but I think this is important, and that is the reason that we asked you to come in here this afternoon; so with the exception of the jury in the box, you are excused from further service in this room at this time.

(The jury panel was excused at 2:28 P. M.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

February 16, 1950

BENJAMIN SCHUMAN,
Court Reporter.

[fol. 46] [Stamp:] Received & Filed Dec. 28, 1951. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. ~~10,300~~ 10,630

CHARLES HAWN, Appellee

vs.

POPE & TALBOT, INC., Appellant

vs.

HAENN SHIP CEILING and REFITTING CORPORATION, Appellee.

STIPULATION

Subject to the approval of the Court, it is hereby stipulated by and among counsel for the respective parties that the time within which the Appellant, Pope & Talbot, Inc., may file its brief and appendix be extended until 30 days after the Supreme Court of the United States shall have rendered its decision in Halcyon Lines and Vinke and Company, Petitioner, vs. Haenn Ship Ceiling and Refitting Corporation (No. 62, October Term, 1951) and Haenn Ship Ceiling and Refitting Corporation, Petitioner, vs. Halcyon Lines and Vinke and Company (No. 197, October Term, 1951).

[fol. 47] The foregoing is proposed inasmuch as it can reasonably be expected that the decision of the Supreme Court in the cases referred to will be determinative of certain issues involved in the present appeal as between the appellant, Pope & Talbot, Inc. and the appellee, Haenn Ship Ceiling and Refitting Corporation, thus removing the necessity for briefing the same and preparing appendix material relevant thereto. The appellee, Charles Hawn, joins in this stipulation for purposes of overall expediency, and in so doing does not represent, by anticipation, that the aforesaid decisions when rendered will be determinative of any right

asserted by the said Charles Hawn as against the appellant, Pope & Talbot, Inc.

Freedman, Landy & Lorry, by Charles Lakatos, Attorneys for appellee, Charles Hawn. Krusen, Evans & Shaw, by Mark D. Alspach, Attorneys for appellant, Pope & Talbot, Inc. Rawle & Henderson, by Joseph W. Henderson, Attorneys for appellee, Haenn Ship Ceiling and Refitting Corporation.

Dated: December 28, 1951.

So ordered, Maris, J. Dec. 28, 1951.

[fol. 48] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,613

CHARLES HAWN, Appellee

vs.

POPE & TALBOT, INC., Appellee

vs.

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellant

STIPULATION

Subject to the approval of the Court, it is hereby stipulated by and among counsel for the respective parties that the time within which the Appellant, Haenn Ship Ceiling and Refitting Corporation, may file its brief and appendix be extended until 30 days after the Supreme Court of the United States shall have rendered its decision in Halcyon Lines and Vinke Corporation, Petitioner, vs. Haenn Ship Ceiling and Refitting Corporation (No. 62, October Term, 1951) and Haenn Ship Ceiling and Refitting Corporation, Petition, vs. Halcyon Lines and Vinke and Company, No. 197, October Term, 1951).

The foregoing is proposed inasmuch as it can reasonably be expected that the decision of the Supreme Court in the

cases referred to will be determinative of certain issues involved in the present appeal as between the appellee, Pope [fol. 49] & Talbot, Inc., and the appellant, Haenn Ship Ceiling and Refitting Corporation, thus removing the necessity for briefing the same and preparing appendix material relevant thereto. The appellee, Charles Hawn, joins in this stipulation for purposes of overall expediency, and in so doing does not represent, by anticipation, that the aforesaid decisions when rendered will be determinative of any right asserted by the said Charles Hawn as against the appellee, Pope & Talbot, Inc.

Freedman, Landy & Lorry, by (S.) Charles Lakatos, Attorneys for appellee, Charles Hawn. Krusen, Evans & Shaw, by (S.) Mark D. Alspach, Attorneys for appellee, Pope & Talbot, Inc. Rawle & Henderson, by (S.) Thomas F. Mount, Attorneys for appellant, Haenn Ship Ceiling and Refitting Corporation.

Dated: January 7, 1952.

Approved: William H. Hastie, Circuit Judge, January 9, 1952.

Received & Filed Jan. 9, 1952. Ida O. Creskoff, Clerk.

[fol. 50] [Stamp:] Received & Filed Feb. 7, 1952. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,630

CHARLES HAWN, Appellee,

vs.

POPE & TALBOT, INC., Appellant,

vs.

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellee

STIPULATION

Subject to the approval of the Court, it is hereby stipulated by and among counsel for the respective parties that

the time within which the Appellant, Pope & Talbot, Inc., may file its brief and appendix be further extended until March 13, 1952.

The foregoing extension is proposed and requested by counsel for Pope & Talbot, Inc. in order to permit counsel to deliberate and confer further with his client as to the effect upon the present case of the decision of the Supreme Court of the United States filed January 14, 1952, in Halcyon Lines and Vinke and Company, Petitioner, vs. Haenn [fol. 51] Ship Ceiling and Refitting Corporation (No. 62, October Term, 1951) and Haenn Ship Ceiling and Refitting Corporation, Petitioner, vs. Halycon Lines and Vinke and Company (No. 197, October Term, 1951). Counsel for Pope & Talbot, Inc. deems it necessary and desirable to consider the aforesaid decision at greater length in order properly and adequately to formulate and brief the issues to be presented to this Court in the present appeal, and to prepare appendix material relevant thereto.

The appellee, Charles Hawn, joins in this stipulation for purposes of overall expediency, and in so doing does not represent that the aforesaid decision is determinative of any right asserted by the said Charles Hawn as against the Appellant, Pope & Talbot, Inc.

Freedman, Landry & Lorry, by Charles Lakatos, Attorneys for appellee, Charles Hawn; Krusen, Evans & Shaw, by Mark D. Alspach, Attorneys for appellant, Pope & Talbot, Inc.; Rawle & Henderson, by Thomas F. Mount, Attorneys for appellee, Haenn Ship Ceiling and Refitting Corporation.

Dated: February 7, 1952.

Approved, Feb. 7, 1952, Kalodner, Circuit Judge.

[fol. 52] [Stamp:] Received & Filed, Feb. 8, 1952. Jda O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,613

CHARLES HAWN, Appellee,

vs.

POPE & TALBOT, INC., Appellee,

vs.

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellant

STIPULATION

Subject to the approval of the Court, it is hereby stipulated by counsel for the respective parties that the time within which the Appellant, Haenn Ship Ceiling and Refitting Corporation may file its brief and appendix be further extended until March 13, 1952.

The foregoing extension is proposed and requested by counsel for Haenn Ship Ceiling and Refitting Corporation because a similar extension has been requested by Appellant, Pope & Talbot, Inc. in No. 10,630 now pending, and both of these Appeals should be argued together, as they present common questions of law and fact. As a further reason, counsel for this Appellant requires additional time to consider the extent to which the decision of the Supreme Court of the United States, filed January 14, 1952 in Hal-
[fol. 53] cyon Lines and Vinke and Company vs. Haenn Ship Ceiling and Refitting Corporation, affects the questions to be presented in this Appeal.

Respectfully submitted, Krusen, Evans & Shaw, by Robert W. B-[illegible], Attorneys for appellee, Pope & Talbot, Inc.; Rawle & Henderson, by Thomas F. Mount, Attorneys for appellant, Haenn Ship Ceiling and Refitting Corporation.

Dated: February 8, 1952.

Approved: Feb. 8, 1952. Kalodner, Circuit Judge.

[fol. 54] Received and Filed Apr. 1, 1952. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS

No. 10,630

CHARLES HAWN, Appellee,

v.

POPE & TALBOT, INC., Appellant,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellee

Subject to the approval of the Court, it is hereby stipulated by and among counsel for the respective parties that the time within which Appellee, Charles Hawn, may file its brief and appendix be extended to and including May 15, 1952.

The foregoing extension is proposed and requested by counsel for Charles Hawn because of the fact that some of [fol. 55] the questions raised by the present appeal involve matters of fundamental importance in the maritime law requiring extensive study and research. Counsel for the Appellees has been unable to properly and adequately conduct the necessary research and to present the matter to this Court within the time allowed under its Rules.

Freedman, Landy and Lorry, by Charles Lakatos, Attorneys for Appellee, Charles Hawn; Krusen, Evans and Shaw, by Mark D. Alspach, Attorneys for Appellant, Pope & Talbot, Inc.; Rawle & Henderson, by Thomas E. Mount, Attorneys for Appellee, Haenn Ship Ceiling and Refitting Corporation.

Dated: April 1, 1952.

[fol. 56] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,630

CHARLES HAWN

vs.

POPE & TALBOT, INC., Appellant,

vs.

HAENN SHIP CEILING AND REFITTING CORPORATION

Upon consideration of the stipulation filed in the above-entitled case,

It is ordered that the time for filing brief and appendix on behalf of Charles Hawn, appellee, be and it is hereby extended to May 5, 1952.

Maris, Circuit Judge.

April 2, 1952.

Received & Filed April 2, 1952, Ida O. Creskoff, Clerk.

[fol. 57] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,630

CHARLES HAWN, Appellee,

v.

POPE & TALBOT, INC., Appellant,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF APPELLEE IN EXCESS OF FIFTY PAGES

To The Honorables, The Judges Of The United States Court of Appeals For The Third Circuit:

Charles Hawn, the appellee in the above entitled cause, by his counsel, Charles Lakatos, moves your Honorable Court for leave to file a brief in his behalf in excess of fifty (50) pages and assigns therefor the following reasons:

[fol. 58] The within cause involves a civil action for personal injuries sustained by the plaintiff, a longshore carpenter on board a vessel in the Port of Philadelphia. The appeal from the judgment on a verdict in the sum of $29,500.00 in favor of the appellee raises approximately twenty distinct questions of law, some of which involve fundamental problems in the maritime law requiring extensive treatment of the historical background of numerous decisions, some of which are adverse to the appellee's position on appeal. Because of the number and complexity of the questions raised, appellee's counsel is unable to adequately treat the problems involved within the limit of fifty pages provided by the rules of your Honorable Court. Appellee's best estimate is that his brief will require approximately sixty printed pages.

Wherefore, appellee moves your Honorable Court for leave to file a brief on his behalf comprised of sixty printed pages.

Respectfully submitted, Freedman, Landy and Lorry, By Charles Lakatos.

Approved, Maris, J., May 6, 1952.

Received & Filed May 6, 1953, Ida O. Creskoff, Clerk.

[fol. 59] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,630

CHARLES HAWN, Appellee,

v.

POPE & TALBOT, INC., Appellant,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF APPELLEE IN EXCESS OF FIFTY PAGES

To The Honorables, The Judges Of The United States Court of Appeals For The Third Circuit:

Charles Hawn, the appellee in the above entitled cause, by his counsel, Charles Lakatos, moves your Honorable Court for leave to file a brief in his behalf in excess of fifty (50) pages and assigns therefor the following reasons: [fol. 60] The within cause involves a civil action for personal injuries sustained by the plaintiff, a longshore carpenter on board a vessel in the Port of Philadelphia. The appeal from the judgment on a verdict in the sum of $29,500.00 in favor of the appellee raises approximately twenty distinct questions of law, some of which involve fundamental problems in the maritime law requiring extensive treatment of the historical background of numerous decisions, some of which are adverse to the appellee's position on appeal. Because of the number and complexity of the questions raised, appellee's counsel is unable to adequately treat the problems involved within the limit of fifty pages provided by the rules of your Honorable Court.

On May 6, 1952 after a conference with the printer who advised that the brief would run to approximately 60 pages, appellee's counsel moved this Court for leave to file said brief which motion was granted by this Court on May 7, 1952. However, upon receipt of the galley proofs, it became apparent that this estimate was incorrect in that the printed brief actually extended to 70 pages. Appellee's

counsel has carefully reviewed the contents of the brief and is of the opinion that it cannot be cut down to 60 printed pages without seriously impairing the argument presented on behalf of appellee.

Wherefore, appellee moves your Honorable Court for leave to file a brief on his behalf comprised of seventy (70) printed pages.

Respectfully submitted, Freedman, Landy and Lorry, By Charles Lakatos, Attorneys for Appellee.

Received & Filed May 12, 1952. Ida O. Creskoff, Clerk.

May 12, 1952: Leave Granted. Kalodner, J.

[fol. 61] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,613

CHARLES HAWN, Plaintiff,

v.

POPE & TALBOT, INC., Appellee,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party Defendant, Appellant

PETITION FOR LEAVE TO FILE BRIEF OUT OF TIME

To the Chief Judge and the Associate Judges of the United States Court of Appeals for the Third Circuit:

The Petition of Pope & Talbot, Inc., Appellee, respectfully prays that this Honorable Court may grant leave to Appellee to file its brief as of May 19, 1952.

1. Appellant's brief and appendix was filed on March 11, 1952.

2. Your Petitioner caused twenty copies of its printed brief to be delivered to the Clerk of your Honorable Court

on May 19, 1952. In causing said brief to be delivered [fol. 62] on that date, counsel for your Petitioner was laboring under the misapprehension that by reason of the questions raised in and briefed both in the within Appeal, and the related Appeal by your Petitioner in No. 10,630, your Petitioner's brief for Appellee in the within Appeal would be due as though the same were a reply brief. Argument on the within Appeal, as well as your Petitioner's Appeal in No. 10,630, is listed for May 22, 1952.

3. The failure of counsel for your Petitioner to file Petitioner's brief for Appellee in the within Appeal was due solely to misunderstanding on the part of counsel, and not to any default on the part of the parties.

4. Your Petitioner avers that for this Honorable Court to grant the present Petition will not prejudice any party to the within litigation; that on the contrary, the granting of the within Petition would be in the interest of justice.

Wherefore, your Petitioner prays that this Honorable Court may enter an order granting leave to the Appellee to file its brief as of May 19, 1952.

Krusen, Evans & Shaw, by Mark D. Alspach, Attorneys for Pope & Talbott, Inc., Appellee.

Approved A.R.S.

Received & Filed May 19, 1952. Ida O. Creskoff, Clerk.

[fol. 63] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,630

CHARLES HAWN

v.

POPE & TALBOT, INC., Appellant

v.

HAENN SHIP CEILING AND REFITTING CORPORATION

MOTION FOR LEAVE TO FILE REPLY BRIEF ON BEHALF OF APPELLEE

To the Honorable Judges of the Court of Appeals for the Third Circuit:

Charles Hawn, Appellee, by his counsel, Charles Lakatos, respectfully moves the Court for leave to file a Reply Brief on his behalf and assigns therefor the following:

The within captioned case was argued before the Court on May 22, 1952. At the oral argument the appellant was granted leave to file a reply brief, and the said brief has [fol. 64] now been filed of record. The appellant raises certain limited questions therein which require a reply, and which appellee has had no opportunity to meet in view of the fact that appellant's reply brief was not filed until after argument.

Wherefore, Appellee seeks leave to file a reply brief on his behalf, limited to matters raised in Appellant's reply brief, and requests this Court to permit him to file same within 20 days after permission is granted.

Respectfully submitted, Freedman, Landy and Lorry, by Charles Lakatos, Attorneys for Appellee.

[fol. 65] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,613

CHARLES HAWN, Plaintiff,

v.

POPE & TALBOT, INC., Appellee,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party Defendant, Appellant

No. 10,630

CHARLES HAWN, Appellee,

v.

POPE & TALBOT, INC., Appellant,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellee

Appeals from the United States District Court for the Eastern District of Pennsylvania

Argued May 22, 1952

Before McLaughlin, Kalodner and Staley, Circuit Judges

OPINION OF THE COURT—Filed August 27, 1952

[fol. 66] By McLAUGHLIN, Circuit Judge:

This is a civil action for personal injuries on a maritime claim. It resulted in a jury verdict in favor of the plaintiff with special findings that the vessel was unseaworthy; that both the defendant bare-boat charterer and the third-party defendant employer were negligent; and that the plaintiff was guilty of contributory negligence to the extent of 17½%. Following the disposal of post-trial motions, 99 F. Supp. 226, judgment was entered in favor of the plaintiff against the defendant in the amount of the verdict less 17½% and

in favor of the defendant and against the third-party defendant, in the amount of the latter's liability under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. Section 901 et seq. In No. 10,630 the defendant charterer appeals and in No. 10,613 the employer is the appellant.

Plaintiff, a ship's carpenter foreman, on November 16, 1947, was employed by the Haenn Ship Ceiling and Refitting Corporation. That morning he and other Haenn employees were making certain minor adjustments to the grain feeders aboard the S.S. John Dickinson then berthed in the Delaware River at Philadelphia. In the late morning and part of the afternoon he was helping prepare No. 4 hold for oats. During the course of the operation he walked forward in the 'tween deck area of that hold around the feeder to the starboard side. Crossing the hatch covers forward of the feeder he went through a "manhole" which had been cut out of the center shifting board over the hatch square. On the starboard side he assigned a man to work in the after end and started back toward the port side of the ship. After proceeding through the "manhole" and beyond it two or three steps he paused in order to give a workman instructions on how to properly nail a cleat. As he turned to continue his journey he slipped on some loose grain underfoot, fell through an opening caused by the absence of a hatch board to the hold below and as a result sustained substantial injuries.

[fol. 67] There was testimony by a ship cleaner foreman, who had been aboard the ship the day before, to the effect that at that time a "couple" of the hatch boards forward of the feeder were off. He did not know whether they were off on the port or starboard side. A longshoreman hatch foreman aboard the ship the morning of the accident testified that there were two port side hatch covers missing on the 'tween deck by No. 4 feeder. There was testimony indicating that it was through the opening caused by the removal of those hatch covers that the plaintiff Hawn fell.

Negligence

The absence of the hatch covers over a length of time which could reasonably be construed as sufficient to have put appellant on constructive notice of that fact; testimony

that the particular area during the critical period was dark and that the footing there was slippery, all combine to present a situation from which the charterer's negligence could be inferred.

Appellant vigorously disclaims any responsibility for Hawn's safety. Its theory is that both Hawn's employer and the cleaners had been engaged in their work by the time charterer of the vessel, the United States Army; that the appellant gave them no working instructions and that they were independent contractors. Therefore, says appellant, it had no connection with the missing hatch boards or the slippery making grain and grain dust and no duty to furnish artificial illumination.

While the jury might well have found that appellant was free from negligence, we cannot agree that appellant was not accountable for negligence if it had existed. Appellant as bare-boat charterer was for all practical purposes here arising the owner in possession of and operating the S.S. John Dickinson. Cannella v. Lykes Bros. S.S. Co., 2 Cir., 174 F. 2d 794, cert. denied 338 U. S. 859. Hawn was working for an intermediate employer. That employer, third-party defendant Haenn Corporation, was functioning [fol. 68] under its contract with the record owner of the ship. However, there is not the slightest indication that as the ship was temporarily berthed at Philadelphia the appellant had surrendered actual control over it. Under those circumstances appellant was faced with its duty of providing Hawn who was engaged in the ship's service a reasonably safe place to work. Seas Shipping Co. v. Sieracki, 328 U. S. 85. Cf. Shields v. United States, 3 Cir., 175 F. 2d 743, 744, cert. denied 338 U. S. 899. There is nothing in the record to indicate that appellant's right as operating owner pro hac vice to control the entire ship, including the No. 4 hold, at the time Hawn was injured was in any way curtailed. There was testimony from which, if accepted, it could be concluded that the No. 4 hold was not a reasonably safe place for a workman engaged as Hawn was and that as a result of that condition he was injured. That question was clearly for the jury. It was properly so submitted by the trial court.

Unseaworthiness

Appellant contends that its warrant of seaworthiness did not extend to Hawn as a ship's carpenter. We think that argument without merit. Hawn was admittedly, as was the fact in Sulovitz v. United States, D.C.E.D.Pa., 64 F. Supp. 637, 640, "* * * actually working in the ship, preparing it to receive a cargo requiring special provision for its storage and was therefore rendering services necessary in the performance of the ship's business of carrying cargo." The difference between Hawn and the longshoreman in Seas Shipping Co. v. Sieracki, supra, is, at most, one of slight degree. Appellant owed Hawn the duty of a seaworthy ship on which to work.

On the merits of this point appellant argues that there was no evidence of unseaworthiness. The contention is not borne out by the record. The absence of the hatch covers in the 'tween deck where Hawn was supervising his work-[fol. 69] men and with the facts justifying an inference of the existence of that situation for such a period as to remove it from the type of transitory conditions exemplified in Cookingham v. United States, 3 Cir., 184 F. 2d 213, cert. denied 340 U. S. 935, was sufficient to allow submission of that question to the jury. Mahnich v. Southern S. S. Co., 321 U. S. 96.

Motion to withdraw juror

Appellant urges that it is entitled to a new trial because of an incident which occurred after the trial below had commenced and counsel had opened. Following that the trial was adjourned in compliance with a request from another judge of the Eastern District that the jury be permitted to attend a conference of the jury panel that afternoon. Later that same day the jury with the balance of the jury panel reported to another courtroom and assisted in an inquiry then being conducted by the district court judge who had called the conference as to the conduct of certain persons who had apparently investigated the jury panel prior to its term of service. One of the questions directed to the jurors in that investigation had to do with their opinions of insurance companies and large corporations. There was some publicity about the inquiry in the Phila-

delphia papers the day after the meeting. On that next day the trial judge queried the jurors in this case whether they thought any particular group had been trying to influence them and whether, under the circumstances, they could render a fair and impartial verdict. Those of the jurors who answered said no to the first question and yes to the second. There was no indication that the impression had been received of an effort being made to influence any member of the jury or that a fair verdict could not be rendered in this issue. The court gave a brief common sense talk to the jurors in which he distinguished between an ordinary legitimate neighborhood inquiry regarding [fol. 70] jurors and an attempt to influence them. Obviously convinced that no harm had been done, he denied appellant's motion to withdraw a juror and allowed the trial to continue. We are satisfied that no prejudicial error was committed by so doing. The incident was minor. It was handled discreetly, promptly and effectively by the district judge. There is not the slightest cause to believe that the episode affected the verdict. Certainly there was no substantial harm to appellant as a result.

The Court's Charge

The court charged a request of the plaintiff that if the jury found the hatch covers missing, and that the ship's officers or crew failed to warn the plaintiff of the existence of this condition, or that the defendant had failed to supply adequate lighting or that there was grain or grain dust on the hatch covers of the 'tween decks of No. 4 hold which rendered them slippery and that defendant failed to use reasonable means to correct that condition "* * * then you may find that Pope & Talbot, Inc. failed to exercise due diligence in providing the plaintiff with a reasonably safe place in which to work." There was no objection regarding this made to the trial court. It is therefore not properly before us. In any event no error of substance is revealed in this portion of the charge. The basis of responsibility of the defendant for the missing hatch covers as given to the jury by the court was in the event they had been missing since prior to the time the cleaners and carpenters had come aboard. "Under the circumstances" was implicit in the

language regarding the failure to supply adequate lighting and the presence of grain or grain dust on the hatch covers constituting a permissible finding that defendant did not furnish a reasonably safe place to work. The circumstance which rendered the lighting and condition of the 'tween deck vital was the open space caused by the previous removal of the hatch boards through which Hawn fell and was hurt. [fol. 71] Given proper lighting Hawn might have seen what was otherwise a trap. Given a clean footing in the 'tween deck Hawn would not have slipped into the hold. The language charged was consonant with defendant's own request on negligence, No. 9, which was charged immediately thereafter by the court and which stated, "You may not find in favor of the Plaintiff unless he has established, by a fair preponderance of the evidence, that his accident was caused, in whole or in part, by some negligence on the part of the Defendant, or the unseaworthiness of the vessel."

Appellant also presently objects to the court saying in the charge regarding the contract between the Army and Haenn, "* * * you might well forget about it as between Mr. Hawn, who was injured, and the shipping company, or owners of the vessel." This objection was not made below and is invalid here. It is substantially the same theory advanced by the appellant in its argument under the caption "Negligence" and is there dealt with.

Appellant complains of the court's interpretation to the jury of the doctrine of seaworthiness to which it had objected below. Concededly, the one condition given the jury on this branch of the claim involved was that concerning the missing hatch covers. In his opinion on the various after trial motions the district judge stated that he did not consider either the lighting or the footing items in that category. Towards the end of the charge appeared the following:

> "Under the maritime law there was an absolute duty on the part of defendant, Pope & Talbot, Inc., the operator of the S.S. 'John Dickinson' to provide a safe and seaworthy vessel and to supply and keep in order the appliances and equipment appurtenant to the ship for the safe use of all shore side workers rendering

services with the consent of the defendant, Pope & Talbot, Inc., and necessary in the performance of the ship's [fol. 72] business. This duty extended to the plaintiff who was on board the 'John Dickinson' with the consent of the defendant, Pope & Talbot, Inc., and who was engaged in preparing the ship to receive cargo. This obligation is absolute in character and is not satisfied by the mere exercise of reasonable care. In other words, under the maritime law the operators of the S. S. 'John Dickinson' are liable for any injuries sustained by the plaintiff by reason of the unseaworthiness of the ship or defects in its appliances and this liability follows even if defendant, Pope & Talbot, Inc., had exercised due care. Therefore, if you should find that at the time the S. S. 'John Dickinson' arrived in the port of Philadelphia and before the shore side workers commenced working on the vessel two hatch covers were missing from the hatch in the 'tween deck of the No. 4 hold, and that by reason thereof plaintiff fell to the hold below and was injured, your verdict should be for the plaintiff and against Pope & Talbot, Inc., even if you should also find that Pope & Talbot, Inc., was not guilty of negligence for any such case, the liability of Pope & Talbot, Inc., is absolute and does not depend upon its failure to exercise due care. In this respect the maritime law differs from the law as generally applied to injuries sustained ashore where proof of negligence is essential to the recovery of damages for personal injuries."

By the above the jury was generally given a fair idea of the doctrine of seaworthiness as followed in this suit by the trial judge and instructed specifically that the sole condition in evidence affected by the rule laid down involved the missing hatch covers. Appellant's dispute with the principle outlined by the trial judge is discussed above under "Seaworthiness".

Appellant objects to the definition of burden of proof in the charge. Though this was not raised below either and [fol. 73] consequently not entitled to be heard on this appeal, our own examination of the charge reveals no material harm ensued in this connection. The objection is in two

parts. The first complains that the court failed to include casual relationship between the vessel's fault and the accident. Request No. 9 of the appellant stated that rule plainly and was charged verbatim. In addition, the necessity of the plaintiff establishing proximate cause was brought home most forcibly to the jury by the following request of counsel for appellant and the court's complete agreement therewith:

> "Mr. Alspach: I ask Your Honor to charge the jury that even if they find that there is unseaworthiness or negligence on our part, that the plaintiff must further establish by a preponderance of the evidence that either one or both was the proximate cause of the accident.
>
> "The Court: They have that. I think we went over that five or six times."

The second part of the objection relates to a statement of the court in the charge on the burden of proof. Taking what the court had said just previously and directly thereafter, there was no real danger of the jury, because of this, becoming confused regarding the true rule.[1] This conclusion is further strengthened because at the end of the charge [fol. 74] the district judge reiterated the correct doctrine

> "While I say that the burden is on Mr. Hawn to prove those things to you by a preponderance of the evidence, if he has, then the burden shifts over to the other side.
>
> "What have they said by way of defense? You have heard both sides now and I am not going to say anything about it. *If Mr. Hawn has not met that burden, and he has not satisfied you by a preponderance of the evidence that the ship was unseaworthy, or that there was negligence on the part of Pope & Talbot, * * * that is the end of the case, you just drop it right there.*" (Emphasis supplied).

---

[1] The full text of the pertinent part of the charge reads:

"*In these cases,* members of the jury, *the burden is always on the plaintiff to prove by a preponderance of the evidence in this particular matter, one, that the ship was unseaworthy, two, that the owners of the vessel were negligent,* * * *."

as to burden of proof when he charged defendant's request No. 9.

The propositions on which all but one of the remainder of appellent's contentions regarding the charge are based, none of which were noted in the district court, have been passed upon either under "Seaworthiness" or "Negligence" above.

Finally as to the charge, appellant stresses that the court committed prejudicial error by language therein with respect to requirements in order to find for the defendant. A reading of the charge as a whole shows that the trial judge expressly instructed the jury that "* * * the happening of an accident alone * * *" did not entitle the plaintiff to damages and that in explaining the circumstances in which their verdict should be for the plaintiff he said,

> "* * * your verdict should be for the plaintiff and against Pope & Talbot, Inc., if you should find that the accident and the consequent injuries to plaintiff resulted from either the unseaworthiness of the S.S. 'John Dickinson' or the negligence of the employees or agents of Pope & Talbot, Inc., or both."

The substance of this was repeated in appellant's own words by the charging of defense request No. 9. Definitely there is no ground for this assertion of serious error.

Plaintiff's Contributory Negligence as a Bar to His Recovery —

This is a maritime claim sued on in the Federal Court, civil side. Appellant advances the flat proposition that since it is a diversity action the Pennsylvania contributory negligence rule which defeats recovery must be applied. It cites Atlee v. Packet Co., 21 Wall. 389 and Belden v. Chase, 150 U. S. 674, both of which contain dicta which does strongly support appellant's position. The Second Circuit after departing from the Atlee and Belden view in Port of [fol. 75] New York Stevedoring Corp v. Castagna, 280 F. 618, cert. denied 258 U. S. 631, reaffirmed its allegiance to those cases in Johnson v. United States Shipping Board Emergency Fleet Corp., 24 F. 2d 963, reversed on other

grounds 280 U. S. 320; In re Pennsylvania R. Co., 48 F. 2d 559, cert. denied 284 U. S. 640; Guerrini v. United States, 167 F. 2d 352, cert. denied 335 U. S. 843.[2]

We think that appellant's view is incorrect and that the thought expressed in the Atlee opinion and followed in Belden to the effect that since plaintiff had elected to sue at law instead of in admiralty on a maritime tort his contributory negligence prevented recovery, no longer reflects the opinion of the Supreme Court. This is demonstrated by its decision in Garrett v. Moore-McCormack, 317 U. S. 239, 245. There in a maritime personal injury claim brought in the Pennsylvania state court the Supreme Court in upholding the federal release rule said, "So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected." Seas Shipping Co. v. Sieracki, supra, was a civil suit for personal injuries by a longshoreman in the court below. The action was founded on unseaworthiness and one defense was that such doctrine was only available in admiralty. The Supreme Court held at page 88: "It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court." See also Carlisle Packing Co. v. Sandanger, 259 U. S. 255; Chelentis v. Luckenbach S. S. Co., 247 U. S. 372.

Appellant insists that Caldarola v. Eckert, 332 U. S. 155, an action by a stevedore on the law side of the federal court, sustains its theory that the state rule is to be applied in the present circumstances. That case turned on whether it was the state of New York's duty to accept the [fol. 76] federal claim involved, not on whether a state statute controlled and thus wiped out a fundamental admiralty right. In the case at bar plaintiff started his action in the federal court on his maritime claim. If the Pennsylvania rule governs he is literally deprived of that claim and according to the theory of the appellant merely because

[2] In an opinion filed July 15, 1952 the Second Circuit has definitely and finally repudiated the Belden v. Chase doctrine. W. E. Hedger Transportation Corporation v. United Fruit Company, — F. 2d —.

he did not title his suit "In Admiralty". Decisional law does not compel this view. It is not the simple matter of adopting state procedure. To permit the state doctrine in this instance to supersede this strictly federal principle as a practical matter destroys the plaintiff's admittedly valid cause of action. We refuse to take that course.

Effect of Plaintiff's Contributory Negligence on the Amount of his Verdict.

Appellant urges that since plaintiff was found guilty of contributory negligence he cannot recover more than half of the jury verdict. We think that the admiralty principle of comparative negligence clearly applies to the case at bar. Unquestionably that is the admiralty doctrine. Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 432-433. It was applied recently by Judge Kalodner sitting in the district court where a longshoreman carpenter had been injured upon navigable waters. Palardy v. United States, D.C.E.D.Pa., 102 F. Supp. 534. To the same effect, Guerrini v. United States, supra; Badalamenti v. United States, 67 F. Supp. 575, modified on other grounds, 2 Cir., 160 F. 2d 422; Kreste v. United States, 2 Cir., 158 F. 2d 575.

Whether Appellant is Entitled to Full Indemnity from the Third-Party Defendant.

Appellant's theory in this point is that under the evidence the verdict fixed the liability of Haenn Corporation as primary and its own as secondary. We are unable to find any substantial foundation for this suggestion. The jury decided that both appellant and Haenn were negligent. [fol. 77] No distinction was attempted as between them. The plain inference is that they were found to be concurrently and equally at fault. Cf. Union Sulphur & Oil Corp. v. W. J. Jones & Son, Inc., 9 Cir., 195 F. 2d 93, 94. With reference to the poor lighting and slippery footing at a time when two hatch covers in Hawn's path were missing which were the elements of the negligence proved, the lighting and hatch cover circumstances were attributable to the vessel under the evidence and the grain which had caused the footing condition had been placed aboard, not by Haenn, but by Atlantic & Gulf Stevedores, Inc.

Compensation Act Contention

Finally appellant argues that Hawn's recovery against it be reduced by the amount of compensation and medical expenses payable to him or on his behalf by his employer under the Act. It is said that otherwise the negligent employer stands completely indemnified by a mutual wrongdoer, the appellant, since Hawn has contracted with his employer to reimburse the latter out of any recovery he obtains in this action against appellant.

We find no sound basis for that proposition. The compensation and medical expenses paid Hawn by his employer had no relationship to negligence of either. If Hawn had been injured solely through his own fault the employer would have been just as responsible to him under the Act (subject to its exceptions below noted) for compensation and medical expenses.[3]

What appellant actually seeks under this point is to accomplish by indirection the exact same result repudiated in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U. S. 282. In that decision the Supreme Court, in refusing to extend the maritime contribution collision rule [fol. 78] to non-collision cases, held that the jointly negligent employer was not responsible for contribution in any amount—specifically not responsible in the sum it would have been compelled to pay as compensation to the injured plaintiff. The court at pp. 285, 286, noted that the Longshoremen's and Harbor Workers' Act "* * * has made fault unimportant in determining the employer's responsibility to his employee; * * *" and then stated that, "The Harbor Workers' Act in turn must be integrated with other acts such as the Jones Act (41 Stat. 1007, 46 U.S.C. Section 688), the Public Vessels Act (43 Stat. 1112, 46 U.S.C. Sections 781-790), the Limited Liability Act (R.S. Section 4281, as amended, 46 U.S.C. Section 181 et seq.) and the Harter Act (27 Stat. 445, 46 U.S.C. Sections 190-195)." In the issue

[3] The Act does specifically provides that, "No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the wilful intention of the employee to injure or kill himself or another." 44 Stat. 1426, 33 U. S. C. Section 903(b).

before us the effect of compliance with appellant's suggestion would be to force Haenn's contribution to the judgment against appellant charterer in the amount of the compensation and medical expenses paid by it to Hawn, its injured employee.

No. 10,615

In this appeal the third-party defendant employer contends that the judgment for contribution against it in the amount it was responsible for under the Longshoremen's and Harbor Workers' Compensation Act should be set aside. At the time the district court decided that under the jury verdict the employer should contribute and in the amount of its compensation liability,[1] it very properly followed our opinion on much the same sort of issue in Baccile v. Halcyon Lines, 187 F. 2d 403. Since then the Supreme Court reversed that decision, sub nom. Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., supra, and as has already been stated, squarely held that in such a case as this where the stevedore employer and the ship owner were both found negligent, the employer was not required to contribute to the owner.

[fol. 79] The charterer again urges that it is entitled to indemnity from Haenn and therefore that the Supreme Court opinion in Halcyon does not control. As we have above indicated that argument finds no support in the present situation where upon the facts proven the jury properly found that the charterer and the employer jointly caused the injury to Hawn.

The judgment in No. 10,630 will be affirmed. The judgment in No. 10,613 will be reversed.

A true Copy:

Teste:

—— ——, Clerk of the United States Court of Appeals for the Third Circuit.

---

[1] See Trial Court's memorandum re final judgment, 100 Fed. Supp. 338.

[fol. 80] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,613

CHARLES HAWN

vs.

POPE & TALBOT, INC., Appellee,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellant

On appeal from the United States District Court for the Eastern District of Pennsylvania

Present: McLaughlin, Kalodner and Staley, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs.

Attest: Ida O. Creskoff, Clerk.

August 27, 1952.

(Received & Filed Aug. 27, 1952. Ida O. Creskoff, Clerk.)

[fol. 81] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,630

CHARLES HAWN, Appellee,

vs.

POPE & TALBOT, INC., Appellant,

vs.

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellee

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: McLAUGHLIN, KALODNER and STALEY, Circuit Judges:

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest: Ida O. Creskoff, Clerk.

August 27, 1952.

Received & Filed August 27, 1952. Ida O. Creskoff, Clerk.

[fol. 82] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,613

CHARLES HAWN, Plaintiff,

v.

POPE & TALBOT, INC., Appellee,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party Defendant, Appellant.

No. 10,630

CHARLES HAWN, Appellee,

v.

POPE & TALBOT, INC., Appellant,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellee.

Present: McLAUGHLIN, KALODNER and STALEY, Circuit Judges.

ORDER

And Now, to wit, this 4th day of September, 1952,

It Is Ordered that the opinion filed herein on August 27, 1952, be and the same is hereby amended as follows:

[fol. 83] By striking out the following language on lines 31 and 32, page 11 of the slip opinion "on the law side of the federal court," and inserting in lieu thereof "in a state court of New York,".

By the Court, McLaughlin, Circuit Judge.

[fol. 84] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,613

CHARLES HAWN

v.

POPE & TALBOT, INC., Appellee

v.

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellant

PETITION FOR ORDER EXTENDING TIME FOR FILING PETITION FOR REHEARING

The Petition of Pope & Talbot, Inc., Appellee, by its attorneys, Krusen, Evans and Shaw, respectfully represents:

1. An Opinion in the within matter was filed by your Honorable Court on August 27, 1952.

2. The necessity for conferring with various parties in interest at remote points as to the posture of the within proceeding, and the scope of the issues presented, have resulted in inability on the part of counsel for Appellee to prepare and file a Petition for Rehearing within the time when the same would otherwise have been due.

[fol. 85] 3. Counsel for your Petitioner has been authorized to state that counsel for the Appellant have no objection to the granting of the Petition herein sought.

Wherefore, Appellee, Pope & Talbot, Inc., prays that your Honorable Court may enter an Order extending the time within which it may file a Petition for Rehearing to and including September 30, 1952.

Krusen, Evans and Shaw, by Mark D. Alspach, Attorneys for Appellee, Pope & Talbot, Inc.

ORDER EXTENDING TIME FOR FILING PETITION FOR REHEARING

Before——

And Now this 19th day of September, A. D., 1952, upon consideration of the foregoing Petition of the Appellee, Pope & Talbot, Inc.,

It is Ordered that the time within which the Appellee, Pope & Talbot, Inc., may file a Petition for Rehearing be, and the same is hereby extended to and including September 30, 1952.

For the Court: McLaughlin, J.

(Received & Filed September 19, 1952. Ida O. Creskoff, Clerk).

[fol. 86] Wherefore, Appellant, Pope & Talbot, Inc., prays that your Honorable Court may enter an Order extending the time within which it may file a Petition for Rehearing to and including September 30, 1952.

Krusen, Evans and Shaw, by Mark D. Alspach, Attorneys for Appellant, Pope & Talbot, Inc.

ORDER EXTENDING TIME FOR FILING PETITION FOR REHEARING

Before —— ——

And now, this 19th day of September, A. D., 1952, upon consideration of the foregoing Petition of the Appellant, Pope & Talbot, Inc.,

It is ordered that the time within which the Appellant, Pope & Talbot, Inc., may file a Petition for Rehearing be, and the same is hereby extended to and including September 30, 1952.

For the Court:

McLaughlin, J.

Received & Filed Sep. 19, 1952, Ida O. Creskoff, Clerk.

[fol. 87] Received & Filed Sep. 11, 1952. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,630

CHARLES HAWN

v.

POPE & TALBOT, INC., Appellant,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION

PETITION FOR ORDER EXTENDING TIME FOR FILING PETITION FOR REHEARING

The Petition of Pope & Talbot, Inc., Appellant, by its attorneys, Krusen, Evans and Shaw, respectfully represents:

1. An Opinion in the within matter was filed by your Honorable Court on August 27, 1952.

2. The necessity for conferring with various parties in interest at remote points as to the posture of the within proceeding, and the scope of the issues presented, have resulted in inability on the part of counsel for Appellant to prepare and file a Petition for Rehearing within the time when the same would otherwise have been due.

3. Counsel for your Petitioner has been authorized to state that counsel for the Appellees have no objection to the granting of the Petition herein sought.

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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 10,630.

CHARLES HAWN

v.

POPE & TALBOT, INC.,

Appellant,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION.

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania.

PETITION FOR REHEARING.

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RECEIVED & FILED
SEP 30 1952
IDA O. CHESTNUTT

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PETITION FOR REHEARING.

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

The Petition of the defendant, Pope & Talbot, Inc., appellant in the within cause, prays for a rehearing and reconsideration of the decision rendered by your Honorable Court on August 27, 1952.

This is a civil action brought by the plaintiff, Charles Hawn, a ship carpenter, to recover damages for personal injuries sustained aboard the defendant Pope & Talbot's vessel while in the employ of the third-party defendant, Haenn Ship Ceiling and Refitting Corp., upon navigable waters within the territorial jurisdiction of Pennsylvania. Jurisdiction is based upon diversity of citizenship. The jury assessed the plaintiff's total damages at $36,000.00. It also found, in answers to special interrogatories, that the plaintiff's negligence contributed to his injury to the extent of 17½%; that Pope & Talbot's vessel was unseaworthy, and that both Pope & Talbot and Haenn were negligent.

Judgment was entered in favor of the plaintiff against Pope & Talbot in the amount of $29,700.00, representing the amount of his total damages assessed by the jury, less 17½%, representing the plaintiff's contributory negligence. The decision of this Court has affirmed that judgment, notwithstanding the firmly established Pennsylvania rule that contributory negligence on the part of a plaintiff bars recovery in a suit at law for personal injuries.

I. The Decision of This Court Is in Conflict With Controlling Decisions of the Supreme Court of the United States, and Does Not Give Effect to This Court's Own Prior Decision in Jordine v. Walling, 185 F. 2d 662.

Defendant contended that the plaintiff's contributory negligence bars recovery. This Court has held that the plaintiff's right to recover irrespective of contributory neg-

ligence is a "strictly federal principle" to which the Pennsylvania rule as to the effect of contributory negligence must yield (Slip Opinion, pages 10-12). This conclusion, it is submitted, cannot be reconciled with *Erie R. Co. v. Tompkins,* 304 U. S. 64, as further explained in *Angel v. Bullington,* 330 U. S. 183.

For a proper consideration of this contention, it is necessary first to examine the basis of the Court's jurisdiction in the present case. Jurisdiction can be sustained solely upon diversity of citizenship. While the plaintiff's claim purportedly arises under the general maritime law, this fact does not bring the present controversy within the purview of the Court's "federal question" jurisdiction, 28 U. S. C. § 1331. This has been squarely held by Judge Maris in *Jordine v. Walling,* 185 F. 2d 662. In discussing the types of cases properly within the District Court's "federal question" jurisdiction, the Court in *Jordine* said (at 185 F. 2d 667-668):

> ". . . They, therefore, do not include cases arising under those general principles of the maritime law which have not been modified by Congressional legislation. This is, of course, not to say that the rules of the maritime law may not be altered by Congress or that if so altered they will not thereby become 'laws • • • of the United States' within the meaning of Section 1331. But the right to maintenance and cure, with which we are here concerned, is a purely maritime right which has not been modified or enlarged by an act of Congress. It follows that a case of maintenance and cure does not arise under the laws of the United States within the meaning of Article III, Section 2, of the Constitution and Section 1331 of Title 28 U. S. C."

This holding applies to the case at bar. The plaintiff's cause of action is purportedly based upon the general maritime law, unmodified by Congressional legislation.

Therefore, his claim does not present a "federal question" which the District Court would be free to decide in accordance with "federal principles" under its federal question jurisdiction.

Thus the ultimate problem presented by the defendant's contention as to the effect of contributory negligence is, to what extent may the District Court, under its diversity jurisdicion, disregard state law, and apply the "federal principles" which the plaintiff contends are controlling? *Erie R. Co. v. Tompkins,* supra, answers this question as follows (at 304 U. S. 78):

> ". . . Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state . . ."

In the light of *Jordine v. Walling,* supra, it is erroneous to transmute the exceptions to the *Erie* doctrine noted above into an all inclusive category denominated "federal law", and, in turn, to treat principles arising under the general maritime law as "federal principles" which do not fall within the strictures placed upon the diversity Court by *Erie.*

True it is that the plaintiff could have invoked the admiralty jurisdiction of the District Court, and had he done so, he would have been entitled to have his cause determined under admiralty principles. He chose, however, to invoke the diversity jurisdiction on the civil side, and in so doing, he was entitled to receive only that relief which he could have received at the hands of a Pennsylvania Court, subject to any defenses controlling in the Pennsylvania Courts. This proposition, and the reasons giving rise to it, are made clear in *Angel v. Bullington,* supra, wherein the Supreme Court said (at 330 U. S. 191-192):

> ". . . Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. The essence of diversity jurisdiction is that a federal court enforces

State law and State policy. If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens.

"Cases like David Lupton's Sons v. Automobile Club of America, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699, are obsolete in so far as they are based on a view of diversity jurisdiction which came to an end with Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487. *That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts.* Compare Suydam v. Broadnax, 14 Pet. 67, 75, 10 L. Ed. 357. Of course, where resort is had to a federal court *not on grounds of diversity of citizenship* but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State. Holmberg v. Armbrecht, 327 U. S. 392, 66 S. Ct. 582, 162 A. L. R. 719." (Emphasis supplied.)

Here the plaintiff's claim was barred by contributory negligence, a defense controlling in the Pennsylvania State Courts. Under *Angel v. Bullington*, therefore, the District

Court in the case at bar lacked the power to grant the relief to which this Court has held the plaintiff is entitled.

Caldarola v. Eckert, 332 U. S. 155, likewise cannot be reconciled with this Court's decision in the present case. In *Caldarola*, a stevedore sued in the New York State Courts for personal injuries and obtained a judgment which was subsequently reversed by the Appellate Division of the Trial Court. The New York Court of Appeals affirmed the Appellate Division, and the Supreme Court of the United States affirmed the judgment of the Court of Appeals.

In the *Caldarola* case, Mr. Justice Frankfurter observed preliminarily (at 332 U. S. 157) that the stevedore could have sued the United States in admiralty; but that he chose not to do so and, "Presumably to obtain the benefit of trial by jury, he asked for relief from New York." The Court went on to hold that the New York Court of Appeals authoritatively determines who is liable, in New York, for such an occurrence as that of which Caldarola complained.

This Court, in the present case (Slip Opinion, pages 11-12) has accepted the plaintiff's contention that *Caldarola* turned on "whether it was the state of New York's duty to accept the federal claim involved, not on whether a state statute controlled and thus wiped out a fundamental admiralty right." We do not wish to misinterpret this Court's use of the word "accept", but in any event it is clear that in *Caldarola*, the State Court assumed jurisdiction of the subject matter and the parties, *and proceeded to decide the issues in accordance with New York law.* New York's disposition of the issues, factual and legal, under its own law was approved by the Supreme Court.

That *Caldarola* involved the same issues presented by the present case is indicated by Mr. Justice Rutledge's dissent. Mr. Justice Rutledge expressed the view that New York law had nothing to do with creating or nullifying the "substantive right" of the plaintiff which, in his view, was

founded in "federal law" (at 332 U. S. 146). This is precisely the view presently advocated by the plaintiff and accepted by this Court.

Under *Caldarola*, a State Court clearly has the right to decide the issues presented by a maritime cause, according to its own internal law. Therefore, under *Erie R. Co. v. Tompkins*, supra, and *Angel v. Bullington*, supra, the diversity Court is obliged to decide these same issues according to the law of the state in which the Court is sitting.

The Pennsylvania rule that contributory negligence bars recovery is the same common law view which the Supreme Court upheld in maritime causes at law in *Atlee v. Packet Co.*, 21 Wall. 389, and *Belden v. Chase*, 150 U. S. 674. A Pennsylvania decision, *Simpson v. Hand*, 6 Wharton 311, is in accord with *Atlee* and *Belden*, and holds that in cases of mutual fault arising upon navigable waters, neither party can recover at law, and at the same time recognizes that in admiralty, the result would be otherwise.

By the very vintage of *Atlee* and *Belden*, the Supreme Court has had ample opportunity to overrule them, had it seen fit. Until the present decision, only the Court of Appeals for the Second Circuit has undertaken to "repudiate" the *Belden* doctrine. *W. E. Hedger Transportation Corp. v. United Fruit Company*, F. 2d (July 15, 1952; cited in Slip Opinion, footnote, page 11). The Supreme Court has overruled neither *Atlee* nor *Belden*, and in *Garrett v. Moore-McCormack*, 317 U. S. 239, where one would have expected the Supreme Court to seize the opportunity, the Court merely *explained Belden*.

The *Garrett* case turned primarily upon the consideration of securing uniformity in the vindication of seamen's rights arising under the Jones Act. To this extent, *Garrett* presented a "federal question", and its rationale is that a state would not be permitted to make less secure a right which *Congress intended* to make more secure. As the Court observed, in stating the premise of its opinion: ". . . the Jones Act is to have a uniform application

throughout the country unaffected by 'local views of common law rules' " (at 317 U. S. 244). On the point presently in controversy, the effect of contributory negligence upon the plaintiff's right to recover, the Court in the *Garrett* case had only this to say:

> ". . . Contributory negligence is not a barrier to a proceeding *in admiralty* or *under the Jones Act*, and the state courts are required to apply this rule in *Jones Act* actions. . . . Similarly state courts may not apply their doctrines of assumption of risk in actions arising *under the Act* . . ." (at 317 U. S. 239, 243-244; emphasis supplied).

This is precisely the reasoning for which the defendant here contends. Contributory negligence would not have barred the plaintiff's recovery, had he invoked the Court's admiralty jurisdiction. Nor would it have barred recovery if Congress had, by statute, as it has in the case of seamen, conferred upon the plaintiff the right to recover in a maritime cause of action irrespective of contributory negligence. Had Congress done so, then the District Court, *sitting under its "federal question" jurisdiction* on the civil side, would have been obliged to obey the Congressional mandate. In that situation, the source of the District Court's jurisdiction would be important and determinative, and would permit the District Court to disregard the prohibitions imposed upon the diversity Court by *Erie R. Co. v. Tompkins* and *Angel v. Buttington*.

We submit that the foregoing reasons, and the authorities cited, warrant the re-examination by this Court of its decision that the diversity Court in the case at bar was not obliged to follow the Pennsylvania rule as to the effect of contributory negligence, under which the plaintiff could not recover.

II. This Court's Rejection of the Equal Division of Damages Rule Is the Result of Misinterpretation of Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, and Is Contrary to the Most Recent Decision by the Second Circuit on the Subject.

The defendant contended that should this Court hold that plaintiff's contributory negligence does not bar recovery, nevertheless, the damages should be reduced by one-half. This Court has rejected this contention, and has held that the plaintiff's damages should be diminished only in the proportion of his contributory negligence specially found by the jury.

In support of its holding that comparative negligence, rather than equal division of damages is the rule, the Court cited *Socony-Vacuum Oil Co. v. Smith,* 305 U. S. 424; *Palardy v. United States,* 102 F. Supp. 534; and three cases from the Second Circuit (Slip Opinion, page 12).

The *Smith* case was an action by a seaman under the Jones Act, and the only question there involved was proper construction of that Federal statute. As to seamen, Congress has in the Jones Act established the system of comparative negligence. As to ship carpenters, the class of which plaintiff is a member, Congress has legislated in only the *Longshoremen's and Harbor Workers' Compensation Act,* 33 U. S. C. A. Sec. 901 *et seq.* The Compensation Act does not give ship carpenters suing shipowners the same rights which the Jones Act gives to seamen as against their employers.

We suggest that the Supreme Court's reference in the *Smith* case to "the established admiralty doctrine of comparative negligence" (at 305 U. S. 431) must logically be interpreted with reference to its context, and the type of controversy there presented. The *Smith* case does not hold that anyone other than a seaman suing his employer comes within the purview of this doctrine. If this contention be valid it is likewise valid with respect to Judge Kalodner's

decision in *Palardy v. United States*, 102 F. Supp. 534, which relies upon the *Smith* case in holding that the doctrine of comparative negligence applies to a suit in admiralty by a ship carpenter.

Turning now to the view of the Second Circuit on this problem, it is submitted that *Guerrini v. United States*, 167 F. 2d 352; *Badalamenti v. United States*, 67 F. Supp. 575, and *Kreste v. United States*, 158 F. 2d 575, are no longer authority on this point in view of the recent decision in *W. E. Hedger Transportation Corporation v. United Fruit Company*, F. 2d (July 15, 1952). This is the same case which, as this Court recognized (Slip Opinion, footnote, page 11) undertook to repudiate the doctrine of *Pelden v. Chase.*

In the *Hedger* case, the Court of Appeals for the Second Circuit expressly endeavored to apply the "admiralty rule" as to the effect of contributory negligence in an action at law. The Court held that a contributorily negligent plaintiff in a non-collision case was entitled to judgment for one-half the damages sustained. The Court's citation of *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. (2nd) 365, 159 P. 2nd 1, is significant. In the *Intagliata* case, under California law, damages would be apportioned according to the respective degrees of fault of the parties; but the California Court held that the "admiralty rule of equal division" must be applied. The Court in the *Hedger* case approved this holding and relied upon it.

Thus it is apparent that the rule of equal division of damages, rather than comparative negligence, is now the law in the Second Circuit. For this reason, and for the additional foregoing reasons, we respectfully urge this Court to entertain reargument on the question of the extent to which the plaintiff's contributory negligence affects his recovery.

III. Should This Court Reject the Foregoing Contentions, Nevertheless Rehearing and Reconsideration Is Warranted of This Court's Refusal to Deduct From the Plaintiff's Recovery the Total of Payments Previously Made to Him Under the Longshoremen's and Harbor Workers' Compensation Act.

In this case the plaintiff and the third-party defendant, Haenn, stand in the relationship of employee and employer. Therefore, the rights of the plaintiff and Haenn, *inter se*, are governed by the Longshoremen's and Harbor Workers' Act, 33 U. S. C. A. § 901 *et seq.* Under the Act, Haenn had made payments of compensation to the plaintiff, and had defrayed certain medical expenses incurred on plaintiff's behalf.

In his suit against the defendant shipowner, plaintiff proved his loss of wages, past, present and future, and his medical expenses as items of damage. By its verdict, the jury compensated plaintiff for these items. It is clear that plaintiff cannot retain both the benefits previously paid to him or on his behalf under the Act, and the full amount of the verdict diminished by the percentage of plaintiff's contributory negligence; for in these circumstances, he would be the beneficiary of a double recovery. The Act does not give the employee a right both to compensation from his employer *and* damages from responsible third parties. *The Etna*, 138 F. 2d 37, 40. Nor, for that matter, does the plaintiff here contend that he possesses this right.

The Act does not provide for subrogation in the employer to the proceeds of its employee's recovery in cases where, as here, no award under the Act had been entered in favor of the injured employee against the employer. Under these circumstances, the employer's right to subrogation has been established by decisional law, under equitable principles, *where the employer's own fault did not contribute to the injury. The Etna*, supra. In this case, the jury found the employer, Haenn, to be at fault, and

this Court has concluded that the "plain inference" is that the shipowner and Haenn were found to be concurrently and equally at fault (Slip Opinion, page 13).

Thus there emerges the problem as to the proper treatment and effect of the compensation and medical payments made to the plaintiff in the overall pattern of rights and liabilities of all of the parties to the present litigation. Defendant contends that the only solution which will prevent the working of an injustice to any party is to reduce the amount of the judgment which it is required to pay the plaintiff by the amount of the compensation and medical payments made under the Act. This Court has rejected this contention, and has thus sanctioned either one of two results: double recovery by the plaintiff, or recovery by Haenn, from the plaintiff of the amount of its payments under the Act. (Actually, there is in this case an agreement between the plaintiff and Haenn whereby plaintiff will reimburse Haenn for these payments out of his recovery against the defendant).

This Court says that what the shipowner is attempting to do is to accomplish by indirection the exact result repudiated in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282. The reasoning is that *Halcyon* prevents recovery of contribution by one joint tortfeasor against another in a maritime non-collision case, and that the effect of defendant's suggestion would be to force Haenn's contribution to the judgment against the defendant.

Actually, defendant's present contention does not raise the question of Haenn's liability for contribution to the judgment, but rather the more fundamental question of what the amount of the judgment should be in the first instance. But passing that for the moment, we would respectfully urge this Court to follow through on its reasoning which led to a denial of our present contention. In so doing, it is apparent that the effect of this Court's decision is to permit Haenn, a joint tortfeasor, to secure not merely

contribution, but full indemnity from another joint tortfeasor, the shipowner.. If *Halcyon* prevents the shipowner from securing contribution from Haenn, then it must also prevent Haenn from making itself entirely whole at the shipowner's expense, with the employee the conduit for recovery in either instance. Thus the result sanctioned by this Court's decision is subject to the same infirmity which this Court perceives in the defendant's contention.

In our view, *Halcyon* did not undertake to decide the question now presented: the effect of compensation payments upon the amount of the plaintiff's recovery in instances where the shipowner and the plaintiff's employer were both at fault. Nor does anything in *Halcyon* attempt to impeach the logic and essential fairness of this Court's observation in this same case (*sub nom. Baccile v. Halcyon Lines*, 187 F. 2d 403, 405) that:

> ". . . while it is not now a question here, we should hardly conclude that § 933, 33 U. S. C. A., creates in the negligent employer a right to fully recover from the negligent third party compensation already paid by the employer to his employee. Otherwise the burden of the injured employee would weigh inevitably and exclusively upon the third party, whose misfortune it is to hurt one within the Act . . ."

We agree with this Court's observation that the compensation and medical expenses paid to the plaintiff by Haenn had no relationship to negligence of either, and that if the plaintiff had been injured solely through his own fault Haenn would have been just as responsible to him under the Act for compensation and medical expenses. But these very factors make it inaccurate to speak of denying Haenn's right to reimburse itself as "contribution" to the judgment in plaintiff's favor. Haenn, as this Court has observed, was obliged to make these payments by law, regardless of fault, and the sole question now presented is

whether it may recoup these payments. The Act does not so provide, and overall fairness dictates otherwise.

The basic injustice of the result which this Court has sanctioned becomes even more apparent, should the plaintiff be permitted to recover all of the damages assessed by the jury, minus only the percentage of fault contributed by the plaintiff. The principle of proportionate damages implies that each participant in the casualty is accountable for the percentage of fault which he contributed to it. Thus the plaintiff is accountable for the percentage which he contributed to his own injuries; and in this case, it is urged that the defendant must respond for all of the rest. However, by definition and by the jury's verdict, Haenn was guilty of fault contributing to the plaintiff's injury. If the inference be that Haenn and the defendant were equally at fault, then it follows that the defendant is being required to pay the plaintiff for Haenn's fault, as well as its own. Under these circumstances, to permit Haenn to reimburse itself out of the plaintiff's recovery would be anomalous. The very fund from which reimbursement would be realized is the product, in part, of Haenn's own fault.

For all of the foregoing reasons, it is respectfully urged that this Court grant a rehearing and reargument on the questions presented.

Respectfully submitted,

MARK D. ALSPACH,
KRUSEN, EVANS AND SHAW,
Attorneys for Appellant-Petitioner.

[fol. 89] Received & Filed Oct. 8, 1952, Ida O. Creskoff.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,630

CHARLES HAWN

v.

POPE & TALBOT, INC., Appellant,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION

SUR PETITION FOR REHEARING.

Present: McLaughlin, Kalodner and Staley, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court:

McLaughlin, J.

Dated: Oct. 8, 1952.

[fol. 90] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,613

CHARLES HAWN, Plaintiff,

v.

POPE & TALBOT, INC., Appellee,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party Defendant, Appellant

No. 10,630

CHARLES HAWN, Appellee,

v.

POPE & TALBOT, INC., Appellant,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellee

MOTION TO STAY MANDATES

[fol. 91] To the Honorable, the Chief Judge and the Associate Judges of the United States Court of Appeals for the Third Circuit:

The motion of Pope & Talbot, Inc., by its attorneys, Krusen, Evans and Shaw, respectfully represents:

1. Your Honorable Court rendered its opinion in the above appeals on August 27, 1952, which opinion was subsequently amended by order of the Court on September 4, 1952. Judgments were issued in each appeal on August 27, 1952.

2. Pope & Talbot, Inc., appellee in No. 10,613, and appellant in No. 10,630, is considering the filing of petitions for certiorari with the Supreme Court of the United States. Counsel for Pope & Talbot, Inc., is presently awaiting definite instructions in this respect from its client, which instructions should be forthcoming within the near future.

3. It is further averred that there is reason to believe that the judgment as issued in No. 10,630 may require amendment so as to reflect accurately the opinion of the Court as delivered. To an extent, the judgment in No. 10,630 is likewise associated with, and in a sense affects the judgment in No. 10,613. Counsel for Pope & Talbot, Inc., intends forthwith to present appropriately to your Honorable Court for consideration the question of the accuracy of the judgment in No. 10,630.

Wherefore, Pope & Talbot, Inc. prays that your Honorable Court may stay the issuance of the mandates in the [fol. 92] above matters for the time permitted by law.

Respectfully submitted, Krusen, Evans and Shaw, by Mark D. Alspach, Attorneys for Pope & Talbot, Inc.

[fol. 93] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,613

CHARLES HAWN, Plaintiff,

v.

POPE & TALBOT, INC., Appellee,

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Third-Party Defendant, Appellant.

No. 10,630

CHARLES HAWN, Appellee,

v.

POPE & TALBOT, INC., Appellant,

v.

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellee.

Present: McLAUGHLIN, KALODNER and STALEY, Circuit Judges:

ORDER

And ~~Now, to~~ wit, this 3d day of November, 1952,

It Is Ordered that the opinion filed herein on August 27, 1952, be and the same is hereby amended as follows:

[fol. 94] By striking out the last paragraph which reads as follows: "The judgment in No. 10,630 will be affirmed. The judgment in No. 10,613 will be reversed." and inserting in lieu thereof the following paragraph: "In accordance with this opinion the judgment in favor of plaintiff-appellee Charles Hawn and against Pope & Talbot, Inc., appellant in No. 10,630 and appellee in No. 10,613, will be affirmed; and the judgment in favor of Pope & Talbot, Inc., and against Haenn Ship Ceiling and Refitting Corporation (appellee in No. 10,630 and appellant in No. 10,613) will be reversed."

By the Court, McLaughlin, Circuit Judge.

[fol. 95] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,613

CHARLES HAWN

vs.

POPE & TALBOT, INC.

and

HAENN SHIP CEILING AND REFITTING CORPORATION, Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: McLAUGHLIN, KALODNER and STALEY, Circuit Judges:

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in favor of plaintiff-appellee Charles Hawn and against Pope & Talbot, Inc., appellant in No. 10,630 and appellee in No. 10,613, be, and the same is hereby affirmed, with costs; and that the judgment in favor of Pope & Talbot, Inc. and against Haenn Ship Ceiling and Refitting Corporation (appellee in No. 10,630 and appellant in No. 10,613) be, and the same is hereby reversed, with costs.

Attest: Ida O. Creskoff, Clerk.

November 3, 1952.

(Received & Filed November 3, 1952. Ida O. Creskoff, Clerk).

[fol. 96] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,630

CHARLES HAWN

vs.

POPE & TALBOT, INC., Appellant,

vs.

HAENN SHIP CEILING AND REFITTING CORPORATION

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: McLAUGHLIN, KALODNER and STALEY, Circuit Judges.

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in favor of plaintiff-appellee Charles Hawn and against Pope & Talbot, Inc., appellant in No. 10,630 and appellee in No. 10,613, be, and the same is hereby affirmed, with costs; and that the judgment in favor of Pope & Talbot, Inc. and against Haenn Ship Ceiling and Refitting Corporation (appellee in No. 10,630 and appellant in No. 10,613) be, and the same is hereby reversed, with costs.

Attest: Ida O. Creskoff, Clerk.

November 3, 1952.

Received & Filed, November 3, 1952, Ida O. Creskoff, Clerk.

[fol. 97] UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania, Greeting:

Whereas, lately in the United States District Court for the Eastern District of Pennsylvania, before you or some of you, in a cause between Charles Hawn, Plaintiff and Pope & Talbot, Inc., Defendant and Third-Party Plaintiff, (Appellee) and Haenn Ship Ceiling and Refitting Corporation and Atlantic & Gulf Stevedores, Inc., Third-Party Defendants, Haenn Ship Ceiling and Refitting Corporation, Third-Party Defendant, (Appellant)—Civil Action No. 9130—a judgment was entered in the District Court on September 28, 1951, which judgment is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by Haenn Ship Ceiling and Refitting Corporation agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in favor of plaintiff-appellee Charles Hawn and against Pope & Talbot, Inc., appellants in No. 10,630 and appellee in No. 10,613, be, and the same is hereby affirmed, with costs; and that the judgment in favor of Pope & Talbot, [fol. 98] Inc. and against Haenn Ship Ceiling and Refitting Corporation (appellee in No. 10,630 and appellant in No. 10,613) be, and the same is hereby reversed, with costs, that the Appellant Haenn Ship Ceiling and Refitting Corporation recover against the Appellee Pope & Talbot, Inc., in the sum of One Hundred Seventy-Two and 50/100 Dollars ($172.50) for costs herein expended and have execution therefor.

November 3, 1952.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 25th day of November in the year of our Lord one thousand nine hundred and fifty-two.

(S.) Ida O. Creskoff, Clerk, United States Court of Appeals for the Third Circuit.

Costs——

Clerk's Fee	$ 25.00
Printing Brief for Aplnt. & Apndx	$ 147.50
Total	$ 172.50

[Endorsed:] Civil Action No. 9130. No. 10,613. Charles Hawn vs. Pope & Talbot, Inc. and Haenn Ship Ceiling and Refitting Corporation, Appellant. Copy. Mandate. Received & Filed November 25, 1952. Ida O. Creskoff, Clerk.

[fol. 99] [Stamp:] Received & Filed November 25, 1952. Ida O. Creskoff, Clerk.

UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania, Greeting:

Whereas, lately in the United States District Court for the District of , before you or some of you, in a cause between Charles Hawn, Plaintiff, (Appellee) and Pope & Talbot, Inc., Defendant and Third-Party Plaintiff, (Appellant) and Haenn Ship Ceiling and Refitting Corporation and Atlantic & Gulf Stevedores, Inc., Third-Party Defendants—Civil Action No. 9130—a judgment was entered in the District Court on September 28, 1951 which judgment is of record in the office of the clerk of the said Dis-

trict Court, to which reference is hereby made, and the same is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by Pope and Talbot, Inc. agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in favor of plaintiff-appellee Charles Hawn and against Pope & Talbot, Inc., appellant in No. 10,630 and appellee in No. 10,613, be, and the same is hereby affirmed, with costs; and that the judgment in favor of Pope & Talbot, Inc. and against Haenn Ship Ceiling and Refitting Corporation (appellee in No. 10,630 and appellant in No. 10,613) be, [fol. 100] and the same is hereby reversed, with costs and that the Appellee, Charles Hawn recover against the Appellant, Pope & Talbot, Inc., in the sum of Two Hundred Ten and 00/100 Dollars ($210.00), and that the Appellee, Haenn Ship Ceiling and Refitting Corporation recover against the Appellant, Pope & Talbot, Inc., in the sum of Twenty and 00/100 Dollars ($20.00) for costs herein expended and have execution therefor. November 3, 1952.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 25th day of November in the year of our Lord one thousand nine hundred and fifty two.

Ida O. Creskoff, Clerk, United States Court of Appeals for the Third Circuit.

Costs—

Clerk's Fee	$
Printing Brief for	$
Appellee, Charles Hawn	$ 185.00
Reply Brief	$ 25.00
Brief for Appellee Haenn Ship Ceiling and Refitting Corporation	$ 20.00
Total	$ 230.00

[Endorsed:] Civil Action No. 9130. No. 10,630. Charles Hawn v. Pope & Talbot, Inc., Appellant, vs. Haenn Ship Ceiling and Refitting Corporation. Copy Mandate. Received & Filed. November 25, 1952. Ida O. Creskoff, Clerk.

[fol. 101] I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Appellant's Brief in No. 10,613, Appendix to Appellant's Brief in No. 10,630, and proceedings in this Court in the cases of Charles Hawn vs. Pope & Talbot, Inc. and Haenn Ship Ceiling and Refitting Corporation, Nos. 10,613 and 10,630, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 11th day of December in the year of our Lord one thousand nine hundred and fifty-two, and of the Independence of the United States the one hundred and seventy-seventh.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal).

[fols. 279-281] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. —

POPE & TALBOT, INC., Petitioner,

vs.

CHARLES HAWN, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—Filed November 18, 1952

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 6, 1953.

Harold H. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 18th day of November, 1952.

[fol. 282] [File endorsement omitted.]

[fol. 283] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 535

POPE & TALBOT, INC., Petitioner,

vs.

CHARLES HAWN and HAENN SHIP CEILING AND REFITTING CORPORATION

ORDER ALLOWING CERTIORARI—Filed June 15, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1952~~ 1953

No. ~~535~~ 13

POPE & TALBOT, INC.

Petitioner

vs.

CHARLES HAWN

and

HAENN SHIP CEILING AND REFITTING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MARK D. ALSPACH,
Counsel for Petitioner.

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Section 2101 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 535

POPE & TALBOT, INC.

Petitioner

vs.

CHARLES HAWN

and

HAENN SHIP CEILING AND REFITTING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Pope & Talbot, Inc. respectfully prays that a writ of certiorari may issue out of this Court to review the judgments of the United States Court of Appeals for the Third Circuit entered on August 27, 1952, in appeals docketed in said Court as No. 10,613 (appeal by the respondent Haenn Ship Ceiling and Refitting Corporation herein) (Rh 71) *

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* The record in this case consists, inter alia, of the Appendix in the Court below in Appeal No. 10,639, which shall hereafter be referred to

and No. 10,630 (appeal by the petitioner herein) (Rh 72), both of which judgments were amended on November 3, 1952 (Rh 97, 98).

Summary and Statement of Matter Involved

This is a civil action brought by respondent Charles Hawn (hereinafter referred to as "Hawn") against petitioner, Pope & Talbot, Inc. (hereinafter referred to as "Pope & Talbot"), to recover damages for personal injuries sustained aboard Pope & Talbot's vessel "John Dickinson." Hawn was a foreman ship carpenter employed by an independent contractor, the respondent Haenn Ship Ceiling and Refitting Corporation (hereinafter referred to as "Haenn"). Hawn was injured while engaged in effecting certain alterations and repairs to the vessel's grain fittings while the vessel was berthed at a pier in Philadelphia, Pennsylvania on November 16, 1947.

Hawn brought his suit in the United States District Court for the Eastern District of New York (Rp 7a). He alleged jurisdiction upon the basis of diversity of citizenship (Rp 7a, 8a). Pope & Talbot having attacked the propriety of venue, the action was subsequently transferred to the United States District Court for the Eastern District of Pennsylvania (Rp 11a). Pope & Talbot brought in Haenn as a third-party defendant, claiming recovery over against Haenn by way of contribution or indemnity (Rp 13a). Pope & Talbot likewise brought in Atlantic and Gulf Stevedores, Inc. as a third-party defendant, but the action as to Atlantic and Gulf was dismissed prior to trial by stipulation (Rp 25a).

The case was tried to a jury, which returned a special

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by the symbol "Rp", and the Appendix in the Court below in Appeal No. 10,613, which shall hereafter be referred to by the symbol "Rh". The record printed subsequent to the aforesaid Appendices is bound following the latter Appendix, and shall likewise be referred to by the symbol "Rh".

verdict in favor of Hawn and answered certain interrogatories. The jury assessed Hawn's damages "without consideration of contributory negligence" at $36,000.00 (Rp 180a-182a). The jury also found that Pope & Talbot's vessel was unseaworthy; that both Pope & Talbot and Haenn were negligent; and that Hawn's own negligence contributed to his injuries to the extent of 17½ per cent (Rp 180a-181a).

All of the parties filed post-trial motions. Pope & Talbot moved, inter alia, for entry of judgment in its favor, and against Hawn, on the ground that the latter's contributory negligence barred recovery. In the alternative, Pope & Talbot moved that Hawn's judgment against it be in the sum of 50 per cent of the damages assessed. Pope & Talbot further moved for judgment in its favor and against Haenn in the full amount of any judgment in favor of Hawn and against Pope & Talbot, or in the alternative, that judgment be entered in Pope & Talbot's favor, and against Haenn in the sum of one-half of any judgment entered in favor of Hawn and against Pope & Talbot (Rp 185a).

Haenn moved, inter alia, for judgment in its favor, and against Pope & Talbot (Rp 183a).

The District Court disposed of the various motions by opinion dated July 17, 1951. The District Court held that Judgment should be entered in favor of Hawn and against Pope & Talbot in the sum of $29,700.00 representing the amount of Hawn's damages diminished by 17½ per cent, the percentage of his contributory negligence as found by the jury. The District Court further held that Haenn should contribute to Pope & Talbot the sum of $14,850.00, unless the limit of Haenn's liability to Hawn under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §901 *et seq.* should be a smaller amount, in which

event the smaller amount was to be the measure of Haenn's contribution to Pope & Talbot (Rp 192a).

After a further hearing, the District Court on September 28, 1951 entered judgment in favor of Hawn and against Pope & Talbot in the sum of $29,700.00, and in favor of Pope & Talbot and against Haenn in the amount of $8,331.35, the latter sum representing the stipulated limit of Haenn's liability to Hawn under the Compensation Act. The judgment contained a proviso granting leave to Haenn to move for modification of the judgment against it "should it hereafter appear that for any reason it may be relieved from paying the full limit of its obligation for compensation under the Longshoremen's and Harbor Workers' Act" (Rp 202a).

Both Pope & Talbot and Haenn appealed to the Court of Appeals for the Third Circuit. Pope & Talbot's appeal, docketed as No. 10,630, attacked (1) the judgment in favor of Hawn and against Pope & Talbot and (2) the amount of the judgment in favor of Pope & Talbot and against Haenn. Haenn's appeal, docketed as No. 10,613, attacked the judgment entered against it and in favor of Pope & Talbot.

The appeals were heard and decided together. In its opinion by Judge McLaughlin dated August 27, 1952, the Court of Appeals held that the principle of comparative negligence applied, and sustained Hawn's $29,700.00 judgment against Pope & Talbot. The Court also rejected Pope & Talbot's alternative contention that Hawn's recovery should be reduced by the amount of payments which Haenn was obliged to pay to Hawn under the Longshoremen's and Harbor Workers' Compensation Act. Finally, the Court held that Pope & Talbot could recover nothing from Haenn (Rh 58).

The judgments of the Court of Appeals were entered on

August 27, 1952 (Rh 71, 72). Pope & Talbot filed a petition for rehearing in its appeal (Rh 77), which was denied on October 8, 1952 (Rh 93). On November 3, 1952, the Court amended the final paragraph of its opinion, which contained only the decretal language, to conform with the sense of the opinion (Rh 96). The judgments were correspondingly amended on November 3, 1952 (Rh 97, 98).

Jurisdiction

The judgments of the Court of Appeals were entered on August 27, 1952 (Rh 71, 72). Petitioner's petition for rehearing in No. 10,630 was denied on October 8, 1952 (Rh 93). Amended judgments in both appeals were entered on November 3, 1952 (Rh 97, 98).

Uncertain as to whether, for purposes of computing the time within which to file a petition for certiorari the judgments of the Court of Appeals had become final prior to October 8, 1952, petitioner obtained an extension of time within which to file the present petition until January 6, 1953, by order of Mr. Justice Burton dated November 18, 1952.

The jurisdiction of this Court to entertain this petition and to grant the same is provided in § 1254 (1) and § 2101 (c) of Title 28, United States Code.

Opinions Below

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed July 17, 1951 (Rp 192a) is reported at 99 F. Supp. 226. Judge McGranery's supplemental opinion, embodying the entry of judgment, filed September 28, 1951 (Rp 202a) is reported at 100 F. Supp. 338. The opinion of Circuit Judge McLaughlin of the United States Court of Appeals

for the Third Circuit, filed August 27, 1952 (Rh 58) is reported at 198 F. 2d 800.

Questions Presented

1. An employee of an independent contractor sustained injuries while working aboard a ship docked upon navigable waters within the territorial jurisdiction of a state under whose internal law contributory negligence bars recovery. He used the shipowner on the civil side of the District Court under its diversity of citizenship jurisdiction. May the plaintiff recover, notwithstanding the jury's finding that he was contributorily negligent? If so, does plaintiff's contributory negligence result in recovery of half of the damages assessed by the jury, or does it result in recovery of the damages assessed diminished only by the percentage that a jury may find represents the quantum of negligence which plaintiff contributed to his own injury?

2. Pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §901 *et. seq.*, the plaintiff's employer had made certain payments to the plaintiff. Under an agreement to which the shipowner is not a party, the plaintiff is to repay the employer, out of his recovery against the shipowner, all sums paid to him by the employer under the compensation Act. The jury found that the employer's negligence had contributed to the plaintiff's injuries. The shipowner, held liable to the plaintiff, was denied any recovery from the employer. In these circumstances, should not the plaintiff's recovery against the shipowner be reduced to the extent of the payments made by the employer to the plaintiff, thus preventing either (1) double recovery by the plaintiff, or (2) indemnification of the negligent employer at the expense of the shipowner?

3. Is the warranty of seaworthiness owing by a shipowner to employees of a stevedore under *Seas Shipping*

Company v. *Sieracki*, 328 U. S. 85, likewise owing by a shipowner to an employee of a carpentry contractor engaged in alterations and repairs to a vessel's fittings?

Reasons Relied Upon For Allowance of the Writ

All of the questions here presented are of intense practical importance. None has ever been squarely decided by this Court. As to each, authoritative clarification of the law would be highly beneficial not only to the diverse maritime interests concerned with this particular litigation, but to all others similarly situated. In everday litigation, the incidence of recurrence of these problems is high. Certainty as to the rules of law governing their solution is necessary. For these reasons alone, the decision below merits review by this Court.

There are additional reasons peculiar to each of the questions presented which demonstrate the desirability for review by this Court. These reasons will be discussed in conjunction with the separte questions to which they pertain.

I. The Question as to the Effect of Contributory Negligence

This is an action at law. Hawn invoked the jurisdiction of the District Court on the ground of diversity of citizenship. The Court was sitting in Pennsylvania, in whose territorial waters the tort giving rise to the cause of action was committed. Under Pennsylvania law, contributory negligence bars recovery in personal injury suits. *Fordyce* v. *White Star Bus Lines*, 304 Pa. 106; *Parris* v. *John B. Kelly, Inc.*, 321 Pa. 78; *Glancy* v. *Meadville Bread Co.*, 340 Pa. 452. Although no Pennsylvania case has decided the effect of contributory negligence in a personal injury suit based upon maritime tort, in other instances of tort committed upon navigable waters, Pennsylvania has held that

contributory negligence bars recovery in an action at law. *Simpson* v. *Hand*, 6 Wharton 311; *Brown* v. *Gilmore*, 92 Pa. 40.

The Court below invoked what it termed the principle of comparative negligence. As we shall presently observe, "comparative" negligence, applied to the jury's findings in this case, is a misnomer. Passing that for the moment, the fact remains that in refusing to apply the rule that contributory negligence bars recovery, the Court below reached a result which fails to give effect to applicable decisions of this Court, and is in conflict with the Court of Appeals for the Ninth Circuit, and with various state courts of last resort.

Atlee v. *Packet Co.*, 88 U. S. 389, and *Belden* v. *Chase*, 150 U. S. 674, established that in cases of maritime tort sued upon at law, contributory negligence bars recovery. While these cases involved damage to vessels, nothing in their basis or reasoning suggests or justifies a valid distinction between personal injury and property damage suits.

The Court below recognized that *Atlee* and *Belden* "strongly support" petitioner's position, but felt that these cases "no longer reflect the opinion" of this Court (at 198 F. 2d 806). The cases relied on by the Court below in essaying this opinion do not justify it. They involve either the recognition, at law, of a ground of recovery theretofore thought to be peculiar to the admiralty: *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; or the rights of seamen, as to whom Congress has bestowed special benefits in voluminous legislation, such as the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688: *Garrett* v. *Moore-McCormack Lines, Inc.*, 317 U. S. 239; *Carlisle Packing Co.* v. *Sandanger*, 259 U. S. 255; *Chelentis* v. *Luckenbach S. S. Co.*, 247 U. S. 372.

This case does not involve the rights of a seaman, bound to the vessel by shipping articles. Rather, it concerns the

rights of a workman bound only to his shore-based employer, casually aboard the vessel to perform a specialized task. Upon Hawn, and others of his class, Congress has not conferred the right to recover damages against third parties irrespective of contributory negligence. Nor is the right of an employee of a contractor to recover damages from the owner of premises upon which he is working in any sense peculiar to the admiralty.

In *Puget Sound Navigation Co.* v. *Nelson*, 41 F. 2d 356, the Court of Appeals for the Ninth Circuit, following *Belden* v. *Chase*, supra, held that in an action at law for personal injuries and property loss arising out of maritime tort, contributory negligence bars recovery.

In *Sea Products Company* v. *Puget Sound Nav. Co.*, 191 Wash. 276, 71 P. 2d 43, and *Wilkins* v. *Foss Launch & Tug Co.*, 20 W. 2d 422, 147 P. 2d 524, the Supreme Court of Washington likewise followed *Belden*, and held that in an action at law, contributory negligence barred recovery for property damage arising from collision upon navigable waters. Consonant with *Belden* are also *Maleeny* v. *Standard Shipbuilding Corp.*, 237 N. Y. 250, and *Proctor* v. *Dillon*, 235 Mass. 538. The conflict of the decision below with the foregoing cases is apparent.

To the extent that the Court below refused to follow the Pennsylvania rule as to the effect of contributory negligence in an action at law, it failed to apply, where it should have, this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, as further explained in *Angel* v. *Bullington*, 330 U. S. 183, wherein this Court said that the *Erie* decision

> ". . . drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts *or were barred by defenses controlling in the State courts* . . ."
> (at 330 U. S. 192; emphasis supplied).

It begs, rather than analyzes the question to state, as did the Court below (at 198 F. 2d 807) that a "strictly federal principle" permits recovery irrespective of contributory negligence. It serves only to confuse the issue to transmute and enlarge the express exceptions to the *Erie* v. *Tompkins* doctrine—"matters governed by the Federal Constitution or by acts of Congress" (at 304 U. S. 78)—into a loosely defined category denominated "federal principle." We are not here dealing with a right granted by the Federal Constitution, or by an act of Congress. Jurisdiction was invoked upon the ground of diversity of citizenship, nor could it have been supported under the District Court's "federal question" jurisdiction, 28 U. S. C. § 1331: *Jordine* v. *Walling*, 185 F. 2d 662, 668 (C. A. 3); *Mullen* v. *Fitz-Simons & Connell Dredge & Dock Co.*, 191 F. 2d 82 (C. A. 7), cert. den., 342 U. S. 888. Thus there is also inherent in the present decision the question of the power, in a jurisdictional sense, of the District Court to grant the relief which it gave.

In refusing to apply the Pennsylvania law, the Court below acted contrary to the view expressed in *Caldarola* v. *Eckert*, 332 U. S. 155, 158, where this Court, dealing with a stevedore's personal injury suit arising on New York waters, said:

> ". . . In any event, whether New York is the source of the right or merely affords the means for enforcing it, here determination is decisive that there is no remedy in its courts for such a business invitee against one who has no control and possession of premises."

The Court below (at 198 F. 2d 806-807) distinguished *Caldarola* on the ground that it turned on whether it was the state of New York's duty to accept the federal claim involved, not on whether a state statute controlled and thus

wiped out a fundamental admiralty right." Petitioner challenges this statement, but we need not labor the point, for the fact remains that in *Caldarola*, this Court approved the disposition of the issues, both factual and legal, by the New York court in accordance with its own law. The only facet of the case which was held to be of "federal concern" was the interpretation of a contract of general agency to which the United States was a party.

That *Caldarola* involved the same issues as the present case is indicated by Mr. Justice Rutledge's dissent, wherein he stated that New York law had nothing to do with creating or nullifying the "substantive right" of the plaintiff which, in his view, was founded in "federal law" (at 332 U. S. 164). This is precisely the view expressed by the Court below in the present case.

The decision below is likewise at variance with the recent decision of this Court in *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, 342 U. S. 282. In *Halcyon*, a case involving maritime personal injury, this Court disallowed contribution between joint tortfeasors. It referred to the abolition of the defense of contributory negligence as between employer and employee under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. Code § 901 *et seq.*, as an inroad on traditional tort law, and refused to make further inroads by way of allowing contribution in a field where Congress has legislated extensively, but stopped short of approving contribution. Congress has not abolished the defense of contributory negligence as between a ship carpenter such as Hawn, and a third party such as petitioner. Furthermore, if in maritime personal injury cases community of fault as between joint tortfeasors does not result in contribution, but leaves the damages where they were sustained, scant logic supports a contrary result

where the partners in fault stand in the relation of plaintiff and defendant.

Even if the Court below were correct in treating this case as though it had been brought in admiralty, nevertheless in attempting to apply the rule of comparative negligence, it misconstrued this Court's decision in *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, and reached a result which is in conflict with decisions by four other Courts of Appeals.

The Court below cited the *Smith* case for the proposition that comparative negligence is "Unquestionably . . . the admiralty doctrine" (at 198 F. 2d 807). The *Smith* case holds no such thing. It deals solely with the rights of a seaman crew member in a suit against his employer, in which instance Congress has prescribed the rule of comparative negligence in the Jones Act, 41 Stat. 1007, 46 U. S. Code § 688.

The rule applied in suits in admiralty is that a contributorily negligent libellant can recover one-half of his damages in a personal injury suit brought by a maritime worker other than a seaman. It has been so held by the Court of Appeals for the Fifth Circuit in *The Granville R. Bacon*, 229 Fed. 715, and *The Wilhelmina*, 232 Fed. 430; by the Court of Appeals for the First Circuit in *The Steam Dredge No. 1*, 134 Fed. 161; and by the Court of Appeals for the Sixth Circuit in *Pioneer S. S. Co.* v. *McCann*, 170 Fed. 873.

The Court of Appeals for the Second Circuit recently applied the admiralty rule in a suit for property damage occasioned by negligence on navigable waters, brought under the diversity jurisdiction of the District Court; *W. E. Hedger Transp. Corp.* v. *United Fruit Company*, 198 F. 2d 376, cert. den. — U. S. — (No. 388, October Term, 1952). In this connection, it is important to note that the Court in *Hedger* adverted to the fact that the New York courts would look to the admiralty rule to determine the effect of con-

tributory negligence (at 198 F. 2d 379), whereas Pennsylvania courts do not, as was noted previously. The *Hedger* case held that the contributorily negligent plaintiff could recover one-half of his damages. This case does not even discuss the possibility of applying the rule of comparative negligence.

Finally, the rule as to the effect of contributory negligence applied by the Court below is unsound on still another score. The rule is said to be comparative negligence, but upon closer inspection, it is not that at all.

Comparative negligence implies that each party to a casualty is answerable for the percentage of fault which he contributed to it. Here the jury found that Hawn, Pope & Talbot and Haenn all contributed to Hawn's injuries. In these circumstances, the fault of Hawn, and that of Pope & Talbot is not "compared," and reflected in dollars, simply by deducting from the recovery the percentage of the damages represented by the quantum of fault which Hawn contributed, and making Pope & Talbot pay the rest. This procedure rather compares the fault of Hawn with the combined fault of Pope & Talbot and Haenn, and makes Pope & Talbot responsible for all of the latter.

The principle of comparative negligence is fair and workable, and may be accurately expressed in terms of percentage-wise diminution of the plaintiff's recovery where, almost by definition, only plaintiff and defendant participate in the operative facts arising out of work being done by the former on the latter's property or premises. For example, there are those instances where Congress has granted an employee the right to sue his employer, and have his damages assessed by comparative negligence: the Jones Act, 41 Stat. 1007, 46 U. S. Code § 688; and the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. Code § 51 *et seq.* But where, as here, the usual factual situation embraces acts

or omissions of the plaintiff, his employer, and the third party on whose premises the work is being performed, and all contribute to the casualty, it is basically unfair to assess the plaintiff only with the percentage of his fault, and to assess the third party for all of the rest.

For all of the foregoing reasons, it is desirable and necessary that this Court review the fundamental question of the effect of contributory negligence under the circumstances here presented.

II. The Question as to Whether Hawn's Recovery Against Petitioner Should Be Reduced by the Sums Paid to Hawn by Haenn Under the Compensation Act.

Hawn's employer, Haenn, had made payments aggregating $5,881.35 to Hawn, or on his behalf, under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 52 Stat. 1164, 33 U. S. Code § 901 *et seq.* The stipulated limit of Haenn's ultimate liability to Hawn under the Act is $8,331.35. Under an agreement to which petitioner is not a party, Hawn is to repay Haenn the sums which Haenn paid him out of his recovery against petitioner (Rp 202a, Rh 69).

The Court below rejected petitioner's contention that Hawn's recovery against it be reduced by the sums paid by Haenn to Hawn. In so doing, the Court below, in deciding a question of first impression, has judicially amended the Compensation Act in a manner neither approved nor required by this Court's decision in *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, *supra*, 342 U. S. 282. It also construed the Compensation Act on a fundamental point in a manner inconsistent with the purpose of the Act.

Hawn's damages were assessed by the jury under a charge which instructed them to include past loss of wages and medical expenses in computing the recovery (Rp

156a). If Hawn were permitted to retain this recovery, in addition to the compensation received from his employer, he would be obtaining a double recovery. Hawn did not urge his entitlement thereto, nor does the Compensation Act permit an employee to retain both compensation and damages from responsible third parties. *The Etna*, 138 F. 2d 37, 40 (C.A. 3).

If, on the other hand, the injured employee reimburses his employer for Compensation Act payments out of his recovery against the third party, no injustice is worked provided the employer's own fault did not contribute to his employee's injury. But here, as the Court below noted in another connection, the "plain inference" is that Haenn and petitioner "were found to be concurrently and equally at fault" (at 198 F. 2d 807). The decision below permits the negligent employer, although insulated from liability for contribution to the shipowner, to secure full indemnity from the shipowner, with the employee the conduit for recovery.

Nothing in the Compensation Act contemplates this result. The Act provides for subrogation in the employer only in cases where payment of compensation was resisted, but directed by an award in a compensation order filed by the Deputy Commissioner. § 33, 44 Stat. 1440, as amended, 52 Stat. 1168, 33 U. S. Code § 933. In these circumstances, the employee's right of action against the third party passes to the employer, who repays himself out of the proceeds of his suit against the third party.

Under no other circumstances does the Compensation Act provide for subrogation in favor of the employer. Where the employer's own fault is not involved, it has been held that he is entitled to subrogation to his employee's recovery, under equitable principles. *The Etna, supra*, 138 F. 2d 37. Until the present decision, no Court has, to petitioner's

knowledge, suggested or held that a negligent employer possesses the same right.

The Court below said that petitioner's contention is an attempt to accomplish by indirection the result repudiated in *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, *supra* (at 198 F. 2d 807). It reasoned that *Halcyon* prevents recovery of contribution by one joint tortfeasor against another, and that the effect of petitioner's contention would be to force Haenn's contribution to Hawn's judgment against petitioner. However, it is evident that the result sanctioned by the Court below is doubly offensive to *Halcyon*, for it permitted Haenn, a joint tortfeasor to secure not merely contribution, but full indemnity from another joint tortfeasor, the petitioner. If *Halcyon* prevents petitioner from securing contribution from Haenn, even more must it prevent Haenn from indemnifying itself at petitioner's expense.

Haenn was obliged to make compensation payments to Hawn by law, regardless of fault on anyone's part. The Compensation Act does not permit Haenn to recoup these payments, and fundamental concepts of fairness prevent such a result. In petitioner's view, the only way in which the compensation payments may be treated, so as to give effect to the purpose of the Compensation Act and to this Court's decision in the *Halcyon* case, is to permit Hawn to retain the compensation payments, and reduce the amount of his judgment against petitioner to that extent. Thus preventing the negligent employer from recovering that which it was legally obligated to pay from the third party who was similarly denied any recovery from the employer.

In rejecting petitioner's contention, the Court below has in effect construed the Compensation Act as creating in a negligent employer a right to fully recover from the negligent third party compensation already paid by the employer to its employee. Thus the burden of the injured employee

is made to weigh inevitably and exclusively upon the third party who happens to contribute to the injury of one within the Act.

The basic injustice of the result which the Court below sanctioned becomes even more apparent, should Hawn be permitted to recover all of the damages assessed by the jury, minus only the percentage of fault which he contributed. As petitioner observed under the preceding question, where both petitioner and Haenn were at fault, it must then follow that petitioner is being required to pay Hawn for Haenn's fault, as well as its own. Under these circumstances, to permit Haenn to reimburse itself out of Hawn's recovery would be anomolous, for the very fund from which reimbursement would be realized is the product, in part, of Haenn's own fault.

For these reasons, it is appropriate that this Court review the question of first impression presented by this case as to the proper disposition of compensation payments made to an injured employee in the comprehensive pattern of rights and liabilities of all of the parties affected by the employee's injury.

III. The Question as to Whether the Shipowner Warrants the Vessel's Seaworthiness to an Employee of a Carpentry Contractor.

In *Seas Shipping Company* v. *Sieracki*, 328 U. S. 85, this Court held that a shipowner warrants the seaworthiness of his vessel and its appurtenances to an employee of a stevedore contractor engaged in loading and discharging the vessel's cargo. The decision below extends this doctrine to an employee of a carpentry contractor engaged in repairs and alterations to the vessel's fittings requisite to the carriage of a specialized cargo.

This extension of the *Sieracki* doctrine brings the Court below into direct conflict with the Court of Appeals for the Second Circuit, which has repeatedly refused to extend the *Sieracki* rule beyond the limitations placed upon it by this Court. The Second Circuit has refused, for instance, to extend the warranty of seaworthiness to an employee of a contractor engaged in cleaning a vessel's boilers: *Guerrini* v. *United States,* 167 F. 2d 352, 354, cert. den. 335 U. S. 843; or to a rigger employed by a repair contractor: *O'Connell* v. *Naess,* 176 F. 2d 138.

Many classes of contractors' employees board a vessel while she is in port to work upon her. Their relationship to the vessel varies as to continuity and intimacy, and as to the extent to which the services they perform were formerly discharged by members of the crew. It is vitally important that there be uniformity among the Circuits as to the duty which a shipowner owes to various categories of workmen.

It is therefore appropiate that the conflict referred to above, springing as it does from the interpretation of a decision of this Court, be resolved by a review of the question by this Court.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

MARK D. ALSPACH,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1953.

No. 13.

POPE & TALBOT, INC.,
Petitioner,

v.

CHARLES HAWN
and
HAENN SHIP CEILING AND REFITTING CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER, POPE & TALBOT, INC.

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IN THE

Supreme Court of the United States.

October Term, 1953.

No. 13.

POPE & TALBOT, INC.
Petitioner,

v.

CHARLES HAWN

AND

HAENN SHIP CEILING AND REFITTING CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER, POPE & TALBOT, INC.

OPINIONS BELOW.

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed July 17, 1951 (R. 192a)* is reported at 99 F. Supp. 226. Judge McGranery's supplemental opinion, embodying the entry of judgment filed September 28, 1951 (R. 202a) is reported at 100 F. Supp. 338. The opinion of Circuit Judge McLaughlin of the United States Court of Appeals for the

* Numbers within parentheses refer to pages in the printed record.

Third Circuit, filed August 27, 1952 (R. 231, as amended September 4, 1952 (R. 246) and November 3, 1952 (R. 272)) is reported at 198 F. 2d 800.

JURISDICTION.

The jurisdiction of this Court to review the final judgments of the United States Court of Appeals for the Third Circuit is provided by § 1254(1) and § 2101(e) of Title 28, U. S. Code.

STATEMENT OF THE CASE.

This is a civil action brought by respondent Charles Hawn (hereinafter referred to as "Hawn") against petitioner, Pope & Talbot, Inc. (hereinafter referred to as "Pope & Talbot"), to recover damages for personal injuries sustained aboard Pope & Talbot's vessel "John Dickinson". Hawn was a foreman carpenter employed by an independent contractor, the respondent Haenn Ship Ceiling and Refitting Corporation (hereinafter referred to as "Haenn"). Hawn was injured while effecting certain alterations and repairs to the vessel's grain fittings while the vessel was berthed at a pier in Philadelphia, Pennsylvania on November 16, 1947.

Hawn brought his suit in the United States District Court for the Eastern District of New York (R. 7a). He alleged jurisdiction upon the basis of diversity of citizenship (R. 7a-8a). Pope & Talbot having attacked the propriety of venue, the action was transferred to the United States District Court for the Eastern District of Pennsylvania (R. 11a).

In its answer to the complaint (R. 12a) and its answer to the amended complaint (R. 20a, 21a), Pope & Talbot asserted inter alia, the defense of contributory negligence. Pope & Talbot brought in Haenn as a third-party defendant, claiming recovery over against Haenn by way of contribution or indemnity (R. 13a). Pope & Talbot likewise

brought in Atlantic & Gulf Stevedores, Inc. as a third-party defendant, but the action as to Atlantic & Gulf was dismissed prior to trial by stipulation (R. 25a).

The case was tried to a jury, which returned a special verdict in favor of Hawn and answered certain interrogatories (R. 180a-182a). In its answers to the interrogatories, the jury found:

(1) that Pope & Talbot's vessel was unseaworthy;

(2) that both Pope & Talbot and Haenn were negligent;

(3) that Hawn's own negligence contributed to his injuries to the extent of 17½%; and

(4) that Hawn's damages "without consideration of contributory negligence" were $36,000.00.

All of the parties filed post-trial motions. Pope & Talbot moved, inter alia, for entry of judgment in its favor, and against Hawn, on the ground that Hawn's contributory negligence barred recovery. In the alternative, Pope & Talbot moved that Hawn's judgment against it be in the sum of 50% of the damages assessed. Pope & Talbot further moved for judgment in its favor and against Haenn in the full amount of any judgment entered in favor of Hawn and against Pope & Talbot or, in the alternative, that judgment be entered in Pope & Talbot's favor, and against Haenn in the sum of one-half of any judgment entered in favor of Hawn and against Pope & Talbot (R. 185a).

Haenn moved, inter alia, for judgment in its favor, and against Pope & Talbot (R. 183a). Hawn moved for judgment in his favor, and against Pope & Talbot, in the sum of $36,000.00 (R. 188a).

The District Court disposed of the various motions by opinion dated July 17, 1951 (R. 192a). The District Court held that judgment should be entered in favor of Hawn in the sum of $29,700.00, representing the amount of Hawn's

damages diminished by 17½%. The District Court further held that Haenn should contribute to Pope & Talbot the sum of $14,850.00, unless the limit of Haenn's liability to Hawn under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq. should be a smaller amount, in which event such smaller amount was to be the measure of Haenn's contribution to Pope & Talbot.

After a further hearing the District Court on September 28, 1951 entered judgment in favor of Hawn and against Pope & Talbot in the sum of $29,700.00 and in favor of Pope & Talbot and against Haenn in the amount of $8,331.35, the latter sum representing the stipulated limit of Haenn's liability to Hawn under the Compensation Act. The judgment granted leave to Haenn to move for modification of the judgment against it "should it hereafter appear that for any reason it may be relieved from paying the full limit of its obligation for compensation under the Longshoremen's and Harbor Workers' Act." (R. 202a-203a).

Both Pope & Talbot and Haenn appealed to the Court of Appeals for the Third Circuit. Pope & Talbot's appeal, docketed as No. 10,630, attacked (1) the judgment in favor of Hawn and against Pope & Talbot and (2) the amount of the judgment in favor of Pope & Talbot and against Haenn. Haenn's appeal, docketed as No. 10,613, attacked the judgment entered against it and in favor of Pope & Talbot.

The appeals were heard and decided together. In its opinion by Judge McLaughlin dated August 27, 1952 (R. 231) the Court of Appeals held that the principle of "comparative negligence" applied and sustained Hawn's $29,700.00 judgment against Pope & Talbot. The Court rejected Pope & Talbot's alternative contention that Hawn's recovery against it should be reduced by the amount of payments which Haenn was obliged to pay to Hawn under the Longshoremen's and Harbor Workers' Compensation Act. Finally, the Court held that Pope & Talbot could recover nothing from Haenn.

The judgments of the Court of Appeals were entered on August 27, 1952 (R. 244, 245). Pope & Talbot filed a petition for rehearing in its appeal (R. 251), which was denied on October 8, 1952 (R. 269). On November 3, 1952, the Court amended the final paragraph of its opinion, which contained only the decretal language, to conform with the sense of the opinion (R. 272). The judgments were correspondingly amended on November 3, 1952 (R. 273, 274).

After obtaining an extension of time by order of Mr. Justice Burton (R. 279), Pope & Talbot filed its petition for a writ of certiorari on January 6, 1953. Pope & Talbot's petition was granted on June 15, 1953 (R. 279).

QUESTIONS PRESENTED.

These are the questions presented by the present writ:

1. An employee of an independent contractor sustained injuries while working aboard a ship docked upon navigable waters within the territorial jurisdiction of a state under whose internal law contributory negligence bars recovery. He sued the shipowner on the civil side of the District Court under its diversity of citizenship jurisdiction. May the plaintiff recover, notwithstanding the jury's finding that he was contributorily negligent? If so, does plaintiff's contributory negligence result in recovery of half of the damages assessed by the jury, or does it result in recovery of the damages assessed diminished only by the percentage that a jury may find represents the quantam of negligence which plaintiff contributed to his own injury?

2. Pursuant to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq., the plaintiff's employer had made certain payments to the plaintiff. Under an agreement to which the shipowner is not a party, the plaintiff is to repay the employer, out of his recovery against the shipowner, all sums paid to him by the employer under the Compensation Act. The jury found that the employer's negligence had contributed to the

plaintiff's injuries. The shipowner, held liable to the plaintiff, was denied any recovery from the employer. In these circumstances, should not the plaintiff's recovery against the shipowner be reduced to the extent of the payments made by the employer to the plaintiff, thus preventing either (1) double recovery by the plaintiff, or (2) indemnification of the negligent employer at the expense of the shipowner?

3. Is the warranty of seaworthiness owing by a shipowner to employees of a stevedore under *Seas Shipping Company v. Sieracki*, 328 U. S. 85, likewise owing by a shipowner to an employee of a carpentry contractor engaged in alterations and repairs to a vessel's fittings?

SPECIFICATIONS OF ERROR.

Petitioner urges that the Court of Appeals for the Third Circuit erred in the following respects:

1. In holding that the rule of loss distribution which it approved, denominated "comparative negligence," was the established admiralty doctrine.

2. In approving the computation of damages recoverable by Hawn from Pope & Talbot on the basis simply of deducting from the total damages sustained a percentage representing the quantum of negligence which Hawn contributed to his own injury.

3. In holding that Hawn's contributory negligence did not bar recovery.

4. In holding that the sums paid by Haenn to Hawn, or on his behalf, under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., should not be deducted from the amount of any judgment which would otherwise result in Hawn's favor by the application of the rule in (2) above.

5. In holding that Pope & Talbot warranted the seaworthiness of its vessel and her appliances to Hawn.

SUMMARY OF ARGUMENT.

As to the First Question: The Effect of Contributory Negligence Upon Recovery.

The Court below held that Hawn could recover from Pope & Talbot his total damages, diminished only by the percentage which the jury found to represent the quantum of negligence which Hawn contributed to his own injury. The Court viewed this result as an application of the established admiralty doctrine of "comparative negligence," notwithstanding that the jury found that all three parties were at fault.

The rule approved below is not the established admiralty doctrine. The admiralty courts have never developed a definitive rule governing the factual situation in the present case. Even in the simple situation where the fault of only libellant and respondent combined to produce the injury, the admiralty authorities are in disagreement as to the method of computing the libellant's damages. The most that admiralty jurisprudence can offer is a number of different rules, some of which are mutually inconsistent.

Nor is the rule fashioned below one of "comparative negligence" as that term is understood to contemplate an adjustment of the injured party's loss on the basis of the proportions of fault which the respective parties contributed to the casualty. To make Pope & Talbot liable for the entire damages, diminished only by the percentage of fault which Hawn contributed, is to make Pope & Talbot accountable for Haenn's fault as well as its own.

This Court has never approved any definitive rule applicable in admiralty as to the method of computing a contributorily negligent libellant's recovery. Nor is this an appropriate situation for the approval or announcement of such a rule. The same considerations as militated against the fashioning of a rule governing loss distribution as be-

tween joint tortfeasors in *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, are present to an even greater degree in this case. Under these circumstances, the announcement of any rule in derogation of the common law, as between Hawn and Pope & Talbot, should be made by Congress. Pending such action the rights of the parties, as in *Halcyon*, should be determined by the common law rule, under which contributory negligence bars recovery.

Even if this Court should hold that there is an established rule which would apply to the facts of this case in courts of admiralty, or should this Court formulate such a rule, nevertheless the rule applicable in the admiralty jurisdiction does not apply in the case at bar. This is an action at law in which jurisdiction of the District Court is based upon diversity of citizenship. The tort which produced Hawn's injuries was committed within the territorial waters of Pennsylvania, where the Court was sitting. The decision of this Court in *Caldarola v. Eckert*, 332 U. S. 155, establishes the right of a State to apply its substantive law to such controversies. Under Pennsylvania law contributory negligence, however slight, bars recovery. Therefore the District Court, under *Erie R. Co. v. Tompkins*, 304 U. S. 64, was obliged to apply the Pennsylvania rule in determining the effect of Hawn's contributory negligence upon recovery. Accordingly, it should have entered judgment in favor of Pope & Talbot.

As to the Second Question: Whether Haenn is Entitled, in Effect, to Indemnify Itself at Pope & Talbot's Expense.

Haenn, as Hawn's employer, had made certain payments to Hawn, or for his account, under the Longshoremen's and Harbor Workers' Act, *supra*. The items covered by these payments were among those for which the jury compensated Hawn by its verdict. Under the law, Hawn may not retain both his damages and the compensation

benefits. Therefore the only alternative, which is in fact the subject of a private agreement between Hawn and Haenn, would be for Hawn to reimburse Haenn out of his recovery against Pope & Talbot.

This result is unsupportable, particularly where the amount owing by Pope & Talbot under the rule below represents in part the product of Haenn's own fault. It would mean that Haenn, a party at fault, would make itself whole at Pope & Talbot's expense, notwithstanding that *Halcyon* prevents the recovery of contribution by Pope & Talbot from Haenn in the circumstances. Such a result is neither consistent with the purpose of the Harbor Workers' Act, nor consonant with the *Halcyon* decision, *supra*.

The Harbor Workers' Act does not recognize any right of subrogation in Haenn in the circumstances. Nor is there any other legal basis or theory upon which Haenn's recovery can be supported. Accordingly, the only proper solution is to permit Hawn to retain the compensation benefits, and to deduct the amount thereof in the first instance from any judgment which would otherwise be recoverable by Hawn against Pope & Talbot.

As to the Third Question: Whether Pope & Talbot Warranted the Seaworthiness of Its Vessel and Her Appliances to Hawn.

In *Seas Shipping Company v. Sieracki*, 328 U. S. 85, this Court held that a shipowner warrants the seaworthiness of its vessel and her appurtenances to an employee of a stevedore contractor engaged in loading cargo. In conflict with an established line of cases from the Second Circuit, the Court below, borrowing general language from the *Sieracki* decision, further extended the warranty to one in Hawn's circumstances.

Hawn does not fall within the defined class of persons to whom the doctrine of unseaworthiness was originally extended in *Sieracki*. Nor is there anything to show that

the work he was performing was traditionally performed by members of the vessel's crew, or that he was exposed to any hazard peculiar to a seaman's employment.

Rather than presenting a situation calling for the further extension of the *Sieracki* doctrine, the present case suggests the propriety of reappraising the validity of the doctrine itself. Particularly to the extent that the dissent in *Sieracki* relies largely upon the impact of Congressional legislation in the field of longshoremen's personal injury, and points out the lack of integration therewith implicit in the result reached by the majority in *Sieracki*, the dissent accurately forecast the approach to the whole problem of maritime personal injury taken in the *Halcyon* case. In this regard, at least, the decision in *Sieracki* warrants re-examination and, for the reasons advanced in the dissent, should be overruled.

ARGUMENT.

First Question: The Effect of Contributory Negligence Upon Recovery.

1. The Rule Below Is an Announcement of a New Principle Under Circumstances Not Permitting the Fashioning of a Substantive Rule by the Courts.

In determining the effect of Hawn's contributory negligence upon his recovery, the Court below purported to apply the principle of "comparative negligence". Without further ado, let us tear off this label and examine the contents of the package.

The jury found that the fault of Hawn, Pope & Talbot, and Haenn combined to produce Hawn's injury. Hawn's own fault was assessed at 17½%. The remaining fault was by definition shared by Pope & Talbot and Haenn—in what proportions, the record does not show. The Court of Appeals considered that the "plain inference" is that Pope & Talbot and Haenn "were found to be concurrently and equally at fault" (R. 241).

On these facts the Court below held that Hawn should recover from Pope & Talbot his damages diminished only to the extent of 17½%. In other words, Hawn is held accountable only for his own fault, whereas Pope & Talbot is made to pay for Haenn's fault, as well as its own.

The rule announced below is *sui generis*. It defies categorical definition. However, it is susceptible to partial analysis which helps to identify its incompatible components.

The rule fashioned below is essentially a mingling of two concepts, each of which is anathema to the other:

1. The concept which holds that Pope & Talbot is accountable for Haenn's fault as well as its own is consonant with the common law and its "all or nothing" philosophy of loss distribution, under which a defendant tort feasor,

regardless of the culpability of others, pays all of the damages or none, depending upon whether the plaintiff was contributorily negligent.

2. The concept which holds that Hawn's contributory negligence does not bar recovery, but merely diminishes the amount recoverable, is a partial application of the doctrine sometimes called comparative negligence, which holds that contributory negligence does not bar recovery, but that the formula of recovery is based upon the quantum of fault of the respective parties.

Thus the Court below has attempted to synthesize two diametrically opposed concepts. Moreover, its product attempts to retain as undiluted ingredients the very tenets on which these concepts are in irreconcilable conflict, both logically and legally.

It is apparent that the totality of the rule fashioned below does not conform with basic theories of comparative negligence nor rudimentary principles of justice, if the degrees of fault of the actors are to be considered and "compared" at all. The rule below does not compare Hawn's fault with Pope & Talbot's; rather, it "compares" Hawn's fault with the *combined* fault of Pope and Talbot and Haenn, and makes Pope and Talbot responsible for all of the latter.

"Comparative negligence", as the Court below calls it, is thus made to serve only Hawn. The rule below extends to him a right which would be defeated by his contributory negligence under the common law. Yet, insofar as the fault of Pope & Talbot and Haenn is concerned, the remnants of common law reasoning survive so as to deprive Pope & Talbot of the benefit of "comparative negligence" as it is extended to Hawn.

Nor can the rule below be defined accurately in terms of "apportionment" of damages. It hands one portion of the consequences of blame to Hawn, two portions to Pope & Talbot.

In fashioning the rule here challenged, the Court below purported to choose between the Pennsylvania law and the "admiralty doctrine", and professed to select the latter. Actually, it did no such thing. The rule below, as we shall demonstrate later, was never originated or developed in the admiralty. The Court below neither borrowed nor applied; it created.

We propose to demonstrate that there was no warrant or occasion for the Court below to look beyond the Pennsylvania law (which follows the common law) in determining the effect of contributory negligence upon recovery. Even if it were permissible for the Court to look elsewhere, we shall further demonstrate that the Court really had no genuine choice under the circumstances. This is so because there is no established admiralty rule of loss distribution in personal injury cases involving fault of more than two parties. The most that admiralty doctrine can do is to offer faint intimations, and those purely by analogy, of several different rules, none of which corresponds with the rule announced below.

One paramount point stands out in bold relief. The decision below, both in the process by which it was reached and in its effect, runs headlong into conflict with the decision of this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation*, 342 U. S. 282. For this reason alone the decision below cannot stand.

In striking down an attempt to enforce contribution between joint tortfeasors, the *Halcyon* case established that courts are not free to fashion substantive rules of loss distribution in derogation of the common law in a field in which Congress has legislated extensively, but has stopped short of approving the rule sought to be established. This Court recognized that if a new rule were to be announced, Congress should announce it through the "legislative process which is peculiarly adapted to determine which of the many possible solutions . . . would be most beneficial in the long run" (at 342 U. S. 286).

This case presents the same fundamental problem as did *Halcyon*—loss distribution among members of the maritime community in personal injury cases. It encompasses the specific facet of the problem considered in *Halcyon*—the proper allocation of the incidents of loss as between shipowner and employer. Added to this problem in the instant case is one which is even more troublesome, more fraught with confusion—the allocation of loss as between plaintiff-employee and defendant-shipowner. Obviously the latter problem is inextricably bound up with the former.

This complex of problems cannot adequately be treated piecemeal. To view any of its aspects as independently capable of judicial solution is to fetter those untouched with predetermined premises which are more likely to embarrass than to assist the congruous resolution of the whole.

Halcyon lays considerable emphasis upon the fact that Congress has already legislated extensively in the maritime personal injury field. It takes particular note of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. § 901 et seq., which this Court said must, in turn, be integrated with other legislation such as the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688; the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. § 781-790; the Limited Liability Act, R. S. § 4281, as amended 46 U. S. C. § 181 et seq., and the Harter Act, 27 Stat. 445, 46 U. S. C. § 190-195.

Let us consider for a moment the extent to which the decision below immediately impinges upon the Harbor Workers' Act, and raises serious questions as to whether it does not actually run afoul of it.

The Harbor Workers' Act, which covers longshoremen, and the Jones Act, which covers seamen, "provided means for indemnification for injuries for all maritime employees who were beyond the constitutional reach of state legislation. A quarter of a century of experience has not caused Congress to change the plan." *Pennsylvania R. Co. v. O'Rourke*, 344 U. S. 334.

The "plan" established by the Harbor Workers' Act for the class of maritime employees to which Hawn belongs substitutes a schedule of compensation for a right of action for damages against the employer. In so doing, as this Court observed in *Halcyon* (at 342 U. S. 285-286) Congress "has made fault unimportant in determining the employer's responsibility to his employee; Congress has made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk. . . . " Not only does the Harbor Workers' Act provide elaborately for the discharge of an employer's obligations thereunder; it contemplates the maintenance of an action by the employee against a "third person"—in the vast majority of instances, as in this case, the shipowner upon whose premises the work is being done. Section 33. It also provides for the distribution of the proceeds from such third party recovery. Section 33.

What is significant for present purposes is that Congress, in the Harbor Workers' Act, said nothing whatsoever as to how the third party action was to be prosecuted. Specifically it had nothing to say as to the method by which the longshoreman's damages were to be ascertained, nor did it see fit to abolish any of the common law defenses which the third party might raise. In these respects Congress made no "inroads" on traditional tort law. The Court below speaks where Congress stood mute.

While as between employee and employer the Harbor Workers' Act strips the latter of the common law defenses and makes his fault unimportant in determining his liability under the compensation schedule, at the same time the Act insulates the employer from liability of any other sort to the employee or anyone else claiming in his right. Section 5. Thus, as it is sometimes said, there is a "quid pro quo" as between employer and employee.

A corresponding mutuality of benefit is conspicuously absent as between employee and shipowner where, as in the rule below, the latter is not only stripped of the defense

of contributory negligence, but is made liable in damages measured, in part, by the quantum of the employer's fault.

These two concepts simply do not mesh. They can scarcely be components of a symmetrical whole.

Another aspect of the rule below involves a genuine problem of integration with the Harbor Workers' Act. As this Court observed in *Halcyon*, Congress made the employer's fault unimportant in determining the employee's rights under the Act. But did Congress likewise intend that the employer's fault should become important, and its burden shifted to the third party in the employee's action against him and specifically, that the quantum of the employer's fault should be made an ingredient in the formula of recovery? That is the effect of the decision below. It is also inescapable that to the extent that the amount of Hawn's recovery is attributable to fault on the part of Haenn, Hawn is being compensated according to a tort-action measure of damages, not according to the statutory schedule.

It must also be remembered that under *Halcyon*, Pope & Talbot is denied the right to recover anything from Haenn. Yet the Court below has, in effect, approved the repayment by Hawn to Haenn, out of Hawn's recovery against Pope & Talbot, of such sums as Haenn was obliged to pay to Hawn under the Harbor Workers' Act. Thus, notwithstanding *Halcyon*, Haenn is permitted to make itself completely whole at Pope & Talbot's expense out of a fund which is the product, in part, of Haenn's own fault. This does not conform with basic notions in integration.

The foregoing circumstances lead to a corollary observation as to the impact of the present decision upon the Congressional plan incorporated in the Harbor Workers' Act. Had Pope & Talbot not been at fault in the present case, Haenn would have been obliged to bear the entire loss imposed upon it by Congress in the first instance. Yet, by the fortuitous circumstance that Pope & Talbot combined with Hawn and Haenn to produce Hawn's injuries, Haenn's *entire* burden is shifted to Pope & Talbot. Is it conceivable

that the vagaries of a particular factual situation were intended to work such a drastic change in the obligations which Congress initially imposed upon the employer?

From the foregoing it is obvious that the present decision has a greatly multiplied potential of entanglement with the Harbor Workers' Act—the very consequence which this Court avoided in the *Halcyon* case by refusing to create substantive rules in derogation of the common law in a field already occupied so extensively by Congress. Beyond that, the rule below is directly opposed, on principle, to the end result in *Halcyon*. In *Halcyon* this Court sanctioned the application of the common law rule of no contribution as between joint tortfeasors, who there stood in the relation of defendant and third party defendant. As between them, the loss was permitted to lie where it was initially sustained. Scant logic compels a contrary result where the partners in fault stand in the relation of plaintiff, defendant, and third party defendant.

The fundamental approach to the problem taken in *Halcyon*, while an eminently justifiable one, is by no means novel, even in maritime affairs.

> " . . . we must always remember that the court cannot make the law; it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the Legislative Department . . . " *The Lottawanna*, 21 Wall. 558.

This same policy was thus articulated by this Court in another landmark case:

> "A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will . . . of the legislature, unless pre-

vented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Second Employers' Liability Cases*, 223 U. S. 1, quoting from *Munn v. Illinois*, 94 U. S. 113, 134.

The "great office of statutes" assumes even greater importance where so many important and divergent interests are necessarily affected, as they are by the rule announced below. Problems of this magnitude should not be resolved by the judicial process, nor their solution influenced by the persuasiveness, or lack of it, of the particular parties before the Court in a given litigation. It may well be that a shift in the tide of policy dictates amelioration of the common law rule that contributory negligence bars recovery, and that some rule of true comparative negligence, which the Court below attempted to, but did not succeed in formulating, will prove to be the best solution. If so, it is for Congress to determine through the legislative process which alone is adapted to hear, and to pick and choose from among the views of all concerned. If deviations from the common law are in order, this course offers the only reasonable assurance that the end result will be amelioration, and not just change.

It is implicit in *Halcyon* that this Court had never expressly approved the rule there sought to be established. The same is true of the rule which Pope & Talbot here attacks. It has never been established in the general maritime law, nor has this Court remotely intimated its approval thereof. To demonstrate this fact, we turn to a consideration of the authorities which are said to establish the rule as to the effect of contributory negligence in personal injury cases under the general maritime law. Analysis of the authorities does more than establish that, as in *Halcyon*, this Court has never approved the rule below. It further demonstrates that it cannot be said with any

degree of certainty that there is any definitive rule governing the effect of contributory negligence upon recovery in cases involving only two parties, let alone a three-party community of fault such as presently exists. This latter conclusion, in turn, makes it clear that the Court below really had no established rule of the admiralty which it could have applied in preference to the common law rule, even if the Court otherwise had a choice in the matter.

2. THE RULE FASHIONED BELOW IS NOT IN ACCORDANCE WITH ANY ESTABLISHED ADMIRALTY DOCTRINE. ADMIRALTY JURISPRUDENCE HAS NOT DEVELOPED ANY DEFINITIVE RULE AS TO THE EFFECT OF CONTRIBUTORY NEGLIGENCE UNDER THE CIRCUMSTANCES HEREIN. IN ACCORDANCE WITH THE HALCYON DECISION, NO RULE SHOULD BE ANNOUNCED BY THE COURT IN THIS CASE. THEREFORE, AS IN HALCYON, THE COMMON LAW RULE GOVERNS, UNDER WHICH HAWN'S CONTRIBUTORY NEGLIGENCE BARS RECOVERY.

> *"Even as to admiralty jurisdiction we must be wary of verbal generalizations unrelated to their applications."*—Mr. Justice Frankfurter, speaking for this Court in *Swift & Co. v. Compania Colombiana Del Caribe,* 339 U. S. 684, 690.

Nowhere is the wisdom of this injunction more aptly demonstrated than in the field of maritime personal injury loss distribution. This subject has been so beset with "verbal generalizations" that the end result has inevitably been the lack of any definitive rule.

Specifically, the general maritime law has never developed any concrete rule of loss distribution in personal injury cases involving fault of three or more parties. There are, of course, many cases involving the simpler situation of loss-sharing as between only libellant and respondent. Representative cases in this category will be analyzed. Even in these instances it is difficult at best to

spell out any workable rule susceptible of general application. There are also numerous cases involving property damage, such as those arising out of collision. The rule applicable to such instances possesses greater certainty, and will likewise be discussed for whatever light it may shed upon the present problem.

Perhaps, in the final analysis, the fallacy of the decision below is that it did not pause to define its terms. The Court spoke of "comparative negligence," but it did not seek the definition of this term or appraise the logic of its application in the present case. As the authorities discussed hereinafter will demonstrate, all that the Court below really did was to attempt to solve the problem by applying a simple label to a thick underlay of confusion.

Let us consider the authorities bearing upon the treatment of contributory negligence on the part of a libellant under the general maritime law.

The logical point of departure is the decision of this Court in *The Max Morris*, 137 U. S. 1. In this case the libellant, a longshoreman, was injured by a combination of his own negligence and that of the respondent vessel's personnel. The case reached this Court on a certified question: whether the libellant under these circumstances was entitled to a decree for "divided damages." This question was answered in the affirmative.

In *The Max Morris* this Court observed that it could not ascertain whether the award contemplated below was a result of the equal division of the libellant's damages, or an award of more or less than one-half thereof. However, the Court stated that the libellant's contributory negligence "should not wholly bar recovery," and that "this rule is applicable to all like cases of marine tort, founded upon negligence, and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision."

Obviously the decision in *The Max Morris*, confined as it was within the limits of the certified question, does not

establish any comprehensive rule, and specifically, does not approve the result reached below. Furthermore, whether *The Max Morris* under present circumstances is a logical point of return, as well as a point of departure, is open to serious question. This case was decided in 1890, long before the intervention of the many legislative enactments in the field. Also, to the extent that *The Max Morris* rationalizes its result as being in harmony with the rule in collision cases, it seems inconsistent with the *Halcyon* decision, *supra*, in which this Court noted that it had never expressly applied the collision rule of loss distribution to non-collision cases (at 342 U. S. 284).

In three other instances this Court has made observations concerning the effect of contributory negligence under the general maritime law. The cases in question are *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424; *The Arizona v. Anelich*, 298 U. S. 110, and *Beadle v. Spencer*, 298 U. S. 124. In each of these instances, however, the Court was not deciding the case under the general maritime law. Rather, it was deciding solely the availability of assumption of risk, in varying aspects, as a defense to a seaman's claim under the Jones Act.

The *Smith* case says, in passing, that assumption of risk in admiralty must be applied "in conjunction with the established admiralty doctrine of comparative negligence . . ." (at 305 U. S. 431).

The *Anelich* case says only that before the Jones Act "contributory negligence was ground for mitigation of damages in suits brought by seamen to recover for injuries attributable to defective equipment" (at 298 U. S. 122).

In *Beadle*, this Court observed that "contributory negligence is not a defense to a suit brought either under the Jones Act or under the maritime law for injuries attributable to negligently defective equipment. Under both it is ground only for apportionment of the damage . . ." (at 298 U. S. 131).

It is evident that the actual decisions in these cases cannot govern the present case, for the Jones Act does not apply to the class of maritime employees to which Hawn belongs. It is equally evident that in none of these instances was this Court attempting to expound any definitive rule as to classes of cases beyond the purview of its decision. In using the expression "comparative negligence" in the *Smith* case, which was seized upon by the Court below in support of its rule, and in employing the language quoted above from the *Anelich* and *Beadle* cases, all that the Court was doing was explaining the philosophy underlying the Jones Act. Furthermore, from the context of these remarks, it is apparent that they were intended to refer only to seamen. This conclusion is further compelled by the authorities cited in each instance by this Court, each of which will be discussed briefly hereinafter.

Since the Court below placed its main reliance in the *Smith* case, which construed the Jones Act, it may be helpful from the sole standpoint of definition of terms to observe what is contemplated by the legislative scheme of loss distribution incorporated in the Jones Act, sometimes referred to as "comparative negligence."

The Jones Act incorporates by reference § 3 of the Federal Employers' Liability Act, 35 Stat. 66, 45 U. S. C. § 53, which provides that in actions brought thereunder to recover damages for personal injuries

> ". . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . ."

Although the literal language of the statute might tend to indicate that this rule contemplates the simple matter of deducting a percentage representing the plaintiff's negligence from the total damages, this is not its basis or purpose.

". . . the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means . . . that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both . . ." *Norfolk & Western Ry. v. Earnest*, 229 U. S. 114, 122.

In other words, this Court points out that the defendant pays in accordance with the proportion of fault which he contributed to the casualty. The "comparative negligence" theory of the Jones Act does not mean that, as in the rule below, the defendant pays according to his own fault plus that of another. The Jones Act, applying as it does solely to a suit as between the seaman and his employer, reaches a result consistent with its purpose by the deduction of a percentage representing the plaintiff's fault; but when one attempts to transpose this simple device to a case which embraces the fault of more than two parties, the fallacy is evident. Even if it be assumed, *arguendo*, that the Court below was warranted in "borrowing" the Jones Act rule, which it was not, nevertheless it is clear from the analysis of that rule made by this Court, quoted above, that the Court below borrowed it on its own terms, and not those of the lender.

For purposes of analysis, let us now examine the authorities cited on the relevant point in the *Smith*, *Anelich*, and *Beadle* cases. These are all seamen's cases, and we offer them not for the purpose of demonstrating that they govern the present case, which they do not, but rather for the purpose of analyzing the origin of the language employed by this Court which was, in turn, borrowed by the Court below to fortify its own rule.

In *The Wanderer,* 20 Fed. 140 (1884), the Court stated that an award to a contributorily negligent libellant would have to be based upon "the exercise of sound discretion . . ." to "give or withhold damages according to principles of equity and justice considering all the circumstances of the case" (at 20 Fed. 143). Actually, the Court awarded nothing, but indicated that it would have awarded the expenses of the seaman's maintenance and cure, had they been proved.

In *Olson v. Flavel,* 34 Fed. 477 (1888), the Court reiterated substantially the basis of decision quoted above, but compensated the seaman for "loss of his time" caused by his injury. The Court awarded wages in the sum of $200.00 as against a $1200.00 claim.

We come now to two cases decided by Judge Addison Brown. In the *Frank and Willie,* 45 Fed. 494 (1891), the Court said that a contributorily negligent seaman—libellant is entitled to recover "something" (at 45 Fed. 495). Damages in the sum of $400.00 were awarded, upon what basis we cannot ascertain. In *The Julia Fowler,* 49 Fed. 277 (1892), Judge Brown said that the case of the contributorily negligent seaman fell "within the principles of *The Max Morris*" (at 49 Fed. 279). Again the Court awarded $400.00, but there is no way of telling how the award was computed or precisely how the Court construed *The Max Morris.*

John A. Roebling's Sons Co. v. Erickson, 261 Fed. 986 (C. A. 2, 1919), was an action at law in which the Court, in remanding the case for a new trial for other reasons, said that "The negligence of the seaman [in a case where an unseaworthy appliance contributed to his injury] does not prevent his recovery, but may be taken into consideration . . . in determining the extent of indemnity which he should receive" (at 261 Fed. 987). How the factor of contributory negligence should be "taken into consideration" is neither discussed nor suggested.

Cricket S. S. Co. v. Parry, 263 Fed. 523 (C. A. 2, 1920) was another action at law in which the Court (at 263 Fed. 526) approved a charge "reducing the recovery to an extent proportionate with the extent of plaintiff's fault" as being "in strict accordance" with the *Erickson* case, *supra*. It is noteworthy that in the *Parry* case the Court distinguished various longshoremen's cases looking the other way, and pointed out that it was concerned only with the rights of seamen, "who have constituted from early times a peculiar class" (at 263 Fed. 526).

In *Storgard v. France & Canada S. S. Corp.*, 263 Fed. 545 (C. A. 2, 1920), likewise an action at law, the Court in remanding the seaman's case for a new trial on other grounds incidentally disapproved a charge that contributory negligence bars recovery. The Court merely indicated that contributory negligence was "an element which may be considered in determining what the amount of indemnity should be" (at 263 Fed. 547). How this element was to be considered is not indicated.

In *Panama R. Co. v. Johnson*, 289 Fed. 964 (C. A. 2, 1923, upholding the constitutionality of the Jones Act), the Court, by way of explaining the philosophy underlying the Jones Act, said that "in the admiralty the award of damages always rests in the sound discretion of the court under all the circumstances. So that in cases of contributory negligence the admiralty court grants damages, if it appears to it that to do so is in accordance with principles of equity and justice" (at 289 Fed. 976). Nothing more definitive was offered.

So much for the authorities cited in *Smith*, *Anelich*, and *Beadle*. We turn now to a consideration of representative admiralty cases involving a claim asserted by a contributorily negligent libellant other than a seaman. These cases likewise bespeak an absence of any established rule. The best they can offer is a choice from among a number of "rules" which are to a large extent mutually inconsistent both in theory and in application.

The Explorer, 20 Fed. 135 (1884), was an action by a contributorily negligent longshoreman. The Court held that "in cases of marine torts it is the rule of the courts of admiralty to exercise 'a conscientious discretion to give or withhold damages upon enlarged principles of justice and equity' ". After quoting from Justice Story in *The Marianna Flora*, 11 Wheat. 54, "A party who is *in delicto* ought to make a strong case to entitle himself to general relief", the Court went on to confess that it "cannot accurately and will not undertake to discriminate between [the parties] as to the extent of the negligence of each and the share of the result produced by each . . ." (at 20 Fed. 139). The Court ultimately awarded only the libellant's "expenses", which included his wages during hospitalization and the admission charge to the hospital (at 20 Fed. 140).

In *Anderson v. The Ashebrooke*, 44 Fed. 124, the Court approved an otherwise undefined "division" of damages in a suit by a contributorily negligent longshoreman.

The Serapis, 49 Fed. 393, was a suit by a contributorily negligent stevedore against his employer-shipowner. The Court held that "Contributory negligence does not of itself necessarily bar recovery, but leaves the Court at liberty to apportion the damages upon principle of equity, and to hold the ship-owner liable for part of the employee's pecuniary loss" (at 49 Fed. 396). Thereupon the Court "divided" the damages and awarded one-half thereof to the libellant (at 49 Fed. 398).

In *The Saratoga*, 87 Fed. 349, the Court held that under "the peculiar principles applicable to cases of this nature in admiralty, an apportionment of the damages must result" (at 87 Fed. 361). The award was for half of the Libellant's damages.

In *The Steam Dredge No. 1*, 134 Fed. 161 (C. A. 1, 1904), the Court "apportioned" the contributorily negligent

longshoreman's damages and awarded him half thereof, stating that it was following the rule in cases of collision.

Pioneer S. S. Co. v. McCann, 170 Fed. 873 (C. A. 6, 1909) looks away from any formula of apportionment in accordance with fault. The Court there observed that "under the evidence, . . . the fault of the shipowner here was greater in degree than that of the libelant". Nevertheless, the Court affirmed the decree below on the ground that it was "satisfied" that the award "was not more than one-half the damages libelant suffered . . ." (at 170 Fed. 880).

Two cases from the following decade likewise espouse the rule of "divided", or half damages. In *The Granville R. Bacon*, 229 Fed. 715 (1916), the Court of Appeals for the Fifth Circuit awarded "divided" damages, saying that it was following *The Max Morris* in so doing. In *The Wilhelmina*, 232 Fed. 430 (1916), the same Court again awarded half damages to a contributorily negligent longshoreman without discussing the basis of the award.

Turning to several of the more recent cases (which, with the exception of the *Guerrini* case, were cited by the Court below) let us consider first *Kreste v. United States*, 158 F. 2d 575 (C. A. 2, 1946). In reversing a decree and remanding for a new trial, the Court of Appeals for the Second Circuit said that if the trial judge found the Libellant negligent, "he should apportion the damages" (at 158 F. 2d 580).

Palardy v. United States, 102 F. Supp. 534 (E. D. Pa. 1952) was an action in admiralty by a longshoreman in which the respondent shipowner impleaded the libellant's employer. In point of fact, the Court found the impleaded respondent free from fault. As between the libellant and respondent, the Court found that the libellant's negligence contributed to his injury to the extent of 25% and reduced the amount of his damages accordingly, ". . . in accordance with the admiralty rule of comparative negligence. . . ." (citing the *Smith* case, at 102 F. Supp. 539).

Badalamenti v. United States, 67 F. Supp. 575 (S. D. N. Y., 1946; modified on other grounds, C. A. 2, 160 F. 2d 422) deserves more than passing attention, for it is an excellent illustration of the prevalent confusion in thinking and terminology.

In *Badalamenti*, the Court purported to approve, *seriatim*, the doctrines of (1) "mitigation" of damages; (2) "comparative negligence"; and (3) the "admiralty rule of the division of damages, in cases of collision, where both vessels are in fault . . ." as being "applicable to all cases of marine tort, founded upon negligence and prosecuted in admiralty" (at 67 Supp. 580).

Notwithstanding its approval of the comprehensive application of the collision rule of divided damages, the Court found that the libellant was 20% responsible for his own injuries and assessed 80% of the damages against the respondent.

In *Guerrini v. United States*, 167 F. 2d 352 (C. A. 2, 1948) the Court of Appeals for the Second Circuit, in remanding a suit brought by a shoreside worker for a finding vital to the question of the respondent's negligence, said:

> "We hold that if the [trial judge] supplies the [necessary finding from which negligence would follow] the faults will be in the proportion of one to four and a decree will be entered for one fourth of the award which he made" (at 167 F. 2d 356).

Thus the rule of the *Guerrini* case seems to be that one ascertains the proportions of the respective faults of the respondent and libellant, converts the proportions into a fraction whose numerator is the proportion of the respondent's fault, and whose denominator is the proportion of the libellant's fault, and awards the libellant that fractional portion of his damages.

Let us pause for a moment to observe the distinct difference between the methods of computation approved in *Guerrini* and *Badalamenti*. The difference is much more

than a nuance of terminology. In *Guerrini*, where the respective faults of respondent and libellant were in the proportion of one to four, the respondent was said to be liable for one-fourth, or 25% of the damages. The exact converse was true in *Badalamenti*, where the respective faults of respondent and libellant were in the ratio of four to one. However, *Badalamenti* holds the respondent liable for 80% of the damages, whereas it would logically follow from the *Guerrini* result that he would be liable for 75% in the circumstances.

Possibly the *Guerrini* rule was announced inadvertently, for it becomes more patently illogical, followed to its conclusion, as the disparity between the respective faults decreases in proportion. When, for instance, the fault of the respondent and that of the libellant are in the proportion of one to two, it does not make sense to hold the respondent for one-half the damages. And, when the faults are equal, in the ratio of one over one, can it be that the respondent must pay full damages?

In any event, do not the foregoing cases reveal what a perplexing assortment of tools is handed to the practitioner?

Obviously a review of all of the authorities extant is beyond the scope of any one brief, and, we are sure beyond the reasonable endurance of the reader. Hence we have confined the foregoing analysis to those lower court cases cited by this Court in the *Smith*, *Anelich* and *Beadle* decisions, and those cited by the Court below as establishing the rule governing the effect of contributory negligence upon recovery under the general maritime law. These were all cases involving only two party fault. To these we added several other representative cases involving libellants other than seamen. One would expect that, if anywhere, some semblance of a definite rule would appear in the numerically simple situation involving only two parties. Yet the fact is that out of the twenty cases considered, at least seven different "rules" emerge:

1. Contributorily negligent libellant's recovery is measured by principles of equity and good conscience, etc.: *The Wanderer, Olson v. Flavel, Panama R. Co. v. Johnson, The Explorer.*

2. Contributorily negligent libellant can recover "something": *The Frank and Willie.*

3. Contributory negligence is a factor which "may be taken into consideration" in measuring the recovery: *John A. Roebling's Sons Co. v. Erickson, Storgard v. France & Canada S. S. Corp.*

4. Contributorily negligent libellant can recover half damages: *Anderson v. The Ashebrooke, The Serapis, The Saratoga, The Steam Dredge No. 1, Pioneer S. S. Co. v. McCann, The Granville R. Bacon, The Wilhelmina.*

5. Libellant's recovery is reduced by the percentage or proportion representing his own fault: *Cricket S. S. Co. v. Parry, Badalamenti v. United States, Palardy v. United States.*

6. Respondent pays libellant a fraction of his damages whose numerator is the proportion of fault contributed by respondent, and whose denominator is the proportion contributed by libellant: *Guerrini v. United States.*

7. Vagueness precludes descriptive classification: *Kreste v. United States; The Julia Fowler.*

There is a relative paucity of authorities dealing with the effect of contributory negligence in a case where, as here, more than two parties, including the injured party, were found to be at fault.

In *The S. S. Samovar*, 72 F. Supp. 574 (N. D. Cal., 1947) the Court said: "since there was no negligence on the part of libelant . . . there is no occasion to *divide* the damages," citing, inter alia, *The Max Morris, supra* and *The Steam*

Dredge No. 1, supra (at 72 F. Supp. 591; emphasis supplied). This was, of course, dicta and the ultimate holding, which made various adjustments of the loss among several respondents upon principles of contribution appears erroneous in the light of the *Halcyon* decision.

In *Portel v. United States*, 85 F. Supp. 458 (S. D. N. Y., 1949) the Court found that the libellant's own fault causally contributed to his injuries to the extent of 25%. Of the remaining fault, the respondent and the impleaded respondent as between themselves were found to be accountable in the ratio of 40% and 60%. Accordingly, the Court simultaneously awarded libellant 75% of his damages, and decreed that the impleaded respondent should pay the respondent 60% of what the latter had to pay libellant, this adjustment being made on the basis of contribution. Again, the holding in this case is questionable in view of *Halcyon*.

Read v. United States, 201 F. 2d 758 (1953) was decided by the Court below subsequent to the present case. In *Read*, the libellant sued the shipowner, who impleaded libellant's employer and also the prime contractor on the job on which Read was injured. The Trial Court found that libellant's own negligence was 50% responsible for his injuries. No finding was made as to the percentages of fault contributed by the other parties. However, the Trial Court allowed the respondent contribution from libellant's employer to the extent of the latter's obligations under the Harbor Workers' Act, and permitted the respondent to recover the deficiency between such sum and the total award from the prime contractor.

Halcyon having intervened during the pendency of the *Read* appeal, the Court of Appeals set aside the judgment of contribution in favor of the respondent and against the libellant's employer. However, since the respondent had been held liable in the first instance on the ground of unseaworthiness, a species of liability without fault, the Court

awarded the respondent full indemnity from the prime contractor since the latter's negligent breach of its contract with the respondent had produced the unseaworthiness.

All that the *Samovar*, *Portel* and *Read* decisions do is to point up the impact of the *Halcyon* decision upon the case at bar. The *Read* case also raises questions as to the significance of qualitative differences in fault in the overall scheme of loss distribution. Undoubtedly the pre-*Halcyon* assumption in many quarters that contribution was allowable as between joint tort feasors must necessarily have influenced the basic approach which the Courts took to the whole problem of loss distribution in maritime personal injury cases. Now that *Halcyon* has intervened so as to affect the rights of tort feasors *inter se*, and commended that problem to Congress, it is even more apparent that similar treatment should be accorded the problems raised as between an injured party at fault and tort feasor subject to liability in multiple party cases. While perfect symmetry may not be absolutely essential, some degree of integration is, to say the least, obviously desirable.

For the sake of completeness, brief mention must be made of the maritime rule of loss distribution in property damage cases—principally those arising out of collision between vessels. We are mindful in so doing that the permissibility of applying the doctrine in such cases to other types of casualties is open to serious question in view of *Halcyon*. However, reference to this body of law may be helpful from the standpoint of understanding alone since, as we have seen, it has frequently been drawn upon for support in the cases involving personal injury.

As this Court observed in *Halcyon*, the established admiralty doctrine is that where two vessels collide due to mutual fault, the mutual wrongdoers share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties (at 342 U. S. 284). What is probably more important for present

purposes is the rule where more than two vessels are at fault. In this instance, the rule is still equal division of damages as among all the participants—into thirds, in the case of three-party fault. *The S. A. McCaulley*, 116 Fed. 107; *The Coamo*, 267 Fed. 686; *The Elmhurst*, 78 F. 2d 536.

One step removed from the collision cases, and probably one step closer to the present problem, is the situation of maritime property damage arising out of negligence unconnected with collision. The Court of Appeals for the Second Circuit had this problem before it quite recently in *W. E. Hedger Transportation Corp. v. United Fruit Co.*, 198 F. 2d 376, cert. den. 344 U. S. 896. The jury found that both plaintiff and defendant were at fault. The Court of Appeals, in applying the maritime rule, held that the plaintiff was entitled to judgment for one-half of his damages. The possibility of applying any other "maritime rule" was not discussed, and apparently not raised.

This, then, is the state of the general maritime law. Nothing we could say would emphasize the obvious—that it is in a badly confused and indefinite state on the general problem of loss distribution in personal injury cases, and in particular, *it offers no definitive rule governing the case at bar*. Other conclusions are not easy to draw. Any party, or any Court which undertakes to pluck a definitive rule from among this mass of conflicting and frequently indefinite authorities must necessarily be working from doubtful premises.

If any general observations may be made as to what rules govern the effect of contributory negligence upon recovery under the general maritime law, they are these:

(1) In two-party cases, there is probably more support, numerically speaking, for the rule of equal division of damages than for any other rule.

(2) The more recent two-party cases indicate a tendency to assess the respondent in an amount diminished by the percentage of fault contributed by the

libellant. The influence of the Jones Act has apparently been felt.

As to (1) above, the logical application of the equal division rule to a case involving three-party fault may well be questioned. If this rule has its origin in the collision rule, then by analogy the collision rule in three-party cases might well apply—i.e., each party should be held accountable for one-third of the total damages. The difficulty of applying this latter formula arises where, as here, one of the parties (Haenn) is insulated by law from direct liability to the injured party, thus rendering Haenn's "one-third share" uncollectible by Hawn in the present proceedings. Here again is evidence of the inevitable entanglement of the present problem with the Harbor Workers' Act.

As to (2) above, we have already developed the proposition that no Court is warranted in borrowing a statutory scheme of loss distribution enacted by Congress for the benefit of seamen alone, and applying it to an entirely different class as to whom Congress has likewise legislated extensively, and not seen fit to apply the plan which it applied to the former. Beyond that, as we have also seen, the essence of the Jones Act "plan" is that the defendant *pays in proportion to the fault which he contributed.* In a case of two-party fault the same *result* may be described in terms of deducting the percentage of the plaintiff's fault from his total damages. But the fatal error in application of the *principle* is committed in a case of three-party fault if the rule is cast in terms of the *result* in a two-party case. Thus, all other considerations aside, if the Court below thought that it was applying the rule of "comparative negligence" in the Jones Act sense, it was mistaken. It made Pope & Talbot pay for Haenn's fault, as well as its own.

The great doubt which surrounds the ascertainment of any clear-cut "rule" in the two-party cases renders even more speculative the attempted formulation of a rule in cases of three-party fault. That the rule fashioned below

is not the established admiralty doctrine is clear. That this Court has never even intimated approval of it, or of any other definitive rule, is also clear. Simply calling it "comparative negligence," without more, evades the problem completely. The opinion below demonstrates the fallacy of dealing in labels—particularly indefinite ones.

Undoubtedly, as this Court observed in *Halcyon*, Courts exercising jurisdiction in maritime affairs possess a certain freedom to fashion rules at variance with the common law. But the recognition of the power to do so does not imply approval of its unfettered exercise, nor uncritical acceptance of the consequences thereof. It transgresses the permissible bounds of a Court's freedom to relieve a party from the burden of a complete common law defense, and in so doing, to make him accountable solely for his own fault, while at the same time compelling his adversary to bear the burden of another's fault, as well as his own. That, in essence, is the decision below. The fundamental reason why it offends is that it falls far short of the criterion for acceptance recognized in *Halcyon*—namely, it leaves one a great deal less than "wholly convinced that it would best serve the ends of justice." (at 342 U. S. 285).

This fact, and the equally important consideration discussed at the outset—that by the very fact of its announcement, any rule in this instance impinges upon a comprehensive statutory scheme, and significantly affects many diverse interests whose views deserve thorough legislative scrutiny—point to two conclusions:

1. The rule below cannot stand.

2. This is not a situation permitting the approval or announcement of any other rule.

Ancillary to the second conclusion, but not essential to its validity, is the fact which is evident from the authorities previously analyzed: as of the pendency of the present decision, there is no established, definitive rule of the admiralty applicable to the facts of this case.

If these conclusions are sustained, then, all other considerations aside, there is no admiralty rule at variance with the common law as to the effect of contributory negligence upon recovery under the facts of the present case. That being so, the only alternative is to apply the common law rule, as in *Halcyon*, and the result must be that Hawn's contributory negligence bars recovery. That ends the case, and the second and third questions presented by the present petition become moot.

Even if this Court should agree that the rule below represents the admiralty doctrine, or if this Court should hold that some other rule is applicable to like cases in admiralty, by no means does it follow that the admiralty rule properly governs the case at bar. We now address ourselves to this proposition.

3. EVEN IF THIS COURT SHOULD HOLD THAT THERE IS A RULE IN COURTS OF ADMIRALTY APPLICABLE IN A SIMILAR CONTROVERSY, WHICH RULE IS AT VARIANCE WITH THE COMMON LAW RULE THAT CONTRIBUTORY NEGLIGENCE BARS RECOVERY, SUCH RULE DOES NOT GOVERN THIS CASE. IN ELECTING TO MAINTAIN HIS ACTION AT LAW IN THE DIVERSITY COURT IN PENNSYLVANIA, WITHIN WHOSE TERRITORIAL WATERS THE TORT WAS COMMITTED, HAWN IS BOUND TO ACCEPT THE CONSEQUENCES OF HIS ELECTION. ONE OF THESE CONSEQUENCES IS THAT THE EFFECT OF CONTRIBUTORY NEGLIGENCE MUST BE DETERMINED BY THE LAW OF PENNSYLVANIA, UNDER WHICH CONTRIBUTORY NEGLIGENCE BARS RECOVERY. THE DIVERSITY COURT WAS NOT AT LIBERTY TO DISREGARD THE PENNSYLVANIA LAW AND APPLY THE RULE OF THE ADMIRALTY COURTS.

The fundamental issue underlying this point is: Does the grant of jurisdiction to the admiralty courts to hear and determine a controversy arising on navigable waters carry with it the power in the admiralty courts to create

rules of decision which must be enforced by courts of law in a state upon whose territorial waters the tort occurred, whose jurisdiction to hear and determine the same controversy is likewise unchallenged?

The answer is no.

The subsidiary question is whether in determining such controversy, a federal diversity court sitting in the aforementioned state may choose the admiralty rules of decision in preference to the rules of decision of the courts within that state.

The answer to this question is likewise no.

We are not here concerned with the extent of the residual power in Congress to resolve the controversy by prescribing substantive rules by legislative enactment, or with the effect which would have to be given to such Congressional command by court of admiralty and court of law alike. Nor are we concerned with the possible impairment of the jurisdiction residing in either court. Hawn had his choice between invoking the jurisdiction of the court of admiralty and the court of law, and he chose the latter.

Hawn invoked the jurisdiction of the District Court on the ground of diversity of citizenship. The Court was sitting in Pennsylvania, in whose territorial waters the tort giving rise to the cause of action was committed. Under Pennsylvania law, contributory negligence, however slight, bars recovery in personal injury suits. *Fordyce v. White Star Bus Lines*, 304 Pa. 106; *Parris v. John B. Kelly, Inc.*, 321 Pa. 78; *Glancy v. Meadville Bread Co.*, 340 Pa. 452. Although no Pennsylvania case has to our knowledge decided the effect of contributory negligence in a personal injury suit based upon maritime tort, in other instances of tort committed upon navigable waters Pennsylvania has approved the rule that contributory negligence bars recovery in an action at law. *Simpson v. Hand*, 6 Wharton 311; *Brown v. Gilmore*, 92 Pa. 40, affd. on other grounds, 102 U. S. 118.

In this setting, the decision of this Court in *Caldarola v. Eckert*, 332 U. S. 155, is dispositive of the question as to the substantive body of law to be applied in determining the effect of contributory negligence upon recovery. Under *Caldarola*, it is clear that the law of Pennsylvania governs.

Caldarola, an employee of a stevedore contractor, was injured while working aboard a vessel docked at a pier in New York City, just as Hawn in the present case was injured while working aboard a vessel docked at a pier in Philadelphia. "Presumably to obtain the benefit of trial by jury"[1] Caldarola sued at law in the New York court, just as Hawn in the present case, presumably for the same reason, sued at law in the District Court.

This Court recognized that Caldarola's claim involved a maritime tort. It also recognized that, as in the present case, it was suable at law by virtue of § 9 of the Judiciary Act of 1789 which saved "to suitors in all cases the right of a common-law remedy where the common law is competent to give it."[2] In the view of this Court, it was immaterial whether the "saving" clause recognized that there were common law rights in the States as to matters also cognizable in admiralty, or whether Congress was concerned only with "saving" to the States the power to use their courts to vindicate rights deriving from the maritime law to the extent that their common law remedies may be available —"a question on which the authorities do not speak with clarity" (at 332 U. S. 157).

> ". . . In any event, whether New York is the source of the right or merely affords the means for enforcing it, her determination is decisive that there is no remedy in its courts for such a business invitee

1. At 332 U. S. 157.

2. Reenacted June 25, 1948, 28 U. S. C. § 1333, as amended May 24, 1949, to read, in relevant part, "saving to suitors in all cases all other remedies to which they are otherwise entitled."

against one who has no control and possession of premises. Compare Douglas v. New York, New Haven & Hartford R. Co., 279 U. S. 377, and Testa v. Katt, 330 U. S. 386.

"The New York Court of Appeals authoritatively determines who is liable, in New York, for such an occurrence as that of which Caldarola complainant [sic]. Insofar as the issues in this case exclusively concern New York law, that court had the final say in holding that one in the relation of the respondents to the petitioner is not liable for the tort of which the latter complains . . ." (at 332 U. S. 158).

The only issue in the *Caldarola* case which was held not to be concluded by New York law was the interpretation of a contract of general agency between the defendant and the United States. This issue alone was held to be a matter of "federal concern", and was viewed as relevant only to the extent that its resolution would tend to establish whether the agent had the kind of control of the vessel *required by New York law* as a basis of liability to third persons (at 332 U. S. 158). This Court held that the agency contract did not create in the defendant the type of "control" required by New York law to make it liable to a person such as Caldarola who was injured on the premises. Accordingly it was held that Caldarola had not established a cause of action under New York law, and recovery was denied.

If the substantive law of a State within whose territorial waters a tort occurs determines, in an action at law, the circumstances under which a cause of action arises, so must it determine the circumstances under which it can be defeated. The separation of these two interrelated concepts is logically impossible. One cannot differentiate between the kind of control required by a state to produce liability, and the kind of conduct on a plaintiff's part required by a state to sustain recovery.

Mr. Justice Rutledge raised the sole dissenting voice in *Caldarola* as to the substantive law applicable apart from the construction of the agency contract. In his view, New York law had "nothing to do with creating or nullifying" Caldarola's "substantive right". He believed that since the liability arose from a maritime tort, it "is a creature of federal law in its entirety, not of state law" (at 332 U. S. 164). He regarded the case "as being controlled in its substantive aspect altogether by federal law" and observed that "the federal maritime law . . . well might hold responsible to an injured longshoreman one who has knowledge that such persons will come aboard and who undertakes to keep the vessel and its equipment in safe condition for their use" (at 332 U. S. 165).

In essence, the view of the Court below is in accord with Mr. Justice Rutledge's dissent. The Court below says that Hawn started his action in the federal court on his "maritime claim". Accordingly, the Court refused to "permit the state doctrine" as to the effect of contributory negligence to "supersede" the "strictly federal principle" which it believed contrary to the state law in this respect (R. 240-241).

The distinction attempted to be drawn by the Court below between *Caldarola* and the present case is patently untenable. The Court below says that *Caldarola* turned on "whether it was the state of New York's duty to accept the federal claim involved, not on whether a state statute controlled and thus wiped out a fundamental admiralty right" (R. 240).

This distinction is at once confused and confusing, for it is premised in terms of dissenting Mr. Justice Rutledge's view of the source and nature of the claim, and because there is no state statute involved here. For that matter, no statute, state or federal, prescribes the rules of decision in this case. It is simply a question of which set of judge-made rules governs.

Passing these doubtful premises, what the Court below is apparently trying to draw is a distinction between "acceptance" of a claim, and the choice of substantive rules which determine the claim once it has been "accepted". Whether there is such a distinction is beside the point for present purposes, for the state court in *Caldarola*, and the diversity court in this case, both took jurisdiction of the respective claims and proceeded through adjudication. *The relevant point is that in Caldarola this Court approved and reaffirmed New York's determination of the issues* (except that it reexamined the agency contract issue) *on the basis of the substantive law of New York.*

The logical analogy between *Caldarola* and the present case is complete. The factual analogy is likewise complete, except in one respect—Caldarola sued in the state court, whereas Hawn sued in the diversity court. This difference gives rise to no distinction.

It is difficult to tell what significance the Court below attached to *Erie R. Co. v. Tompkins*, 304 U. S. 64. One thing is certain: It did not follow *Erie*, when it should have. Rather, it concluded, in effect, that this case concerns a federal claim sued on in a federal court, governed by a federal principle. In short, it holds that this case is governed by a species of federal common law—the general maritime law. The net result of its decision is to make the diversity court a forum alternative to the admiralty court, deciding cases arising on navigable waters according to the admiralty law (with trial by jury). And, of course, this forum is available only to suitors who happen to be hurt by a citizen of another state.

This result demonstrates what happens when one attempts to transmute the express exceptions to the *Erie* doctrine—"matters governed by the Federal Constitution or by acts of Congress" (at 304 U. S. 78)—into a general category denominated "federal principle". We are not here dealing with a right granted by Congress, or by the Co sti-

tution. If any "federal right", in the Constitutional sense, were involved; if the right of action were "founded in federal law, as creating the maritime tort" (Mr. Justice Rutledge, dissenting in *Caldarola*, at 332 U. S. 164), then these considerations would be equally relevant in determining the extent to which a state could attach determinative incidents thereto in the first instance. That these premises are unsound is concluded by *Caldarola*.

Clearly the choice of law here is not between some overriding "federal principle" and the state law. The choice is between the rules of decision created by the admiralty court, and those created by the state court. Cf. *Levinson v. Deupree*, — U. S. — (June 1, 1953). Hawn made the choice of the latter when he elected to sue at law in the diversity court. No conflict of jurisdictions exists. Any dissimilarity in results of the possible suits is attributable solely to the exercise of a free choice by the suitor himself.

It is equally obvious that the decision below is in direct conflict with the delineation of the *Erie* doctrine in *Angel v. Bullington*, 330 U. S. 183, wherein this Court said that the *Erie* decision

> ". . . drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts *or were barred by defenses controlling in the State courts* . . ." (at 330 U. S. 192; emphasis supplied).

Not only is the right of the Pennsylvania courts to apply their substantive common law rule as to the effect of contributory negligence recognized by *Caldarola*; it is also consonant with the prior expressions of this Court in *Atlee v. Packet Co.*, 88 U. S. 389, and *Belden v. Chase*, 150 U. S. 674.

The *Atlee* case recognizes, albeit by dictum, that the suitor's choice of forum as between admiralty court and court of law makes a significant difference insofar as the effect of contributory negligence is concerned. This obser-

vation was made a rule of decision in *Belden v. Chase*, wherein it was held that contributory negligence bars recovery in an action at law based upon a tort occurring on navigable waters. To our knowledge this Court has never questioned the validity of *Belden v. Chase* on this point.

The *Belden* doctrine was followed by the Ninth Circuit in *Puget Sound Navigation Co. v. Nelson*, 41 F. 2d 356, cert. den. 282 U. S. 869. The Supreme Court of Washington followed *Belden* in *Sea Products Company v. Puget Sound Nav. Co.*, 191 Wash. 276, 71 P. 2d 43, and *Wilkins v. Foss Launch & Tug Co.*, 20 W. 2d 422, 147 P. 2d 524.

The Court below says (R. 240) that the Second Circuit "definitely and finally repudiated" the *Belden* doctrine in *W. E. Hedger Transp. Corp. v. United Fruit Co.*, 198 F. 2d 376, cert. den. 344 U. S. 896. The *Hedger* case was a diversity suit for property damage on navigable waters. The Court applied the admiralty rule of equal division of damages in measuring the recovery of a contributorily negligent plaintiff. The important point for present purposes is, as the Court in *Hedger* noted, that the New York courts would look to the admiralty rule to determine the effect of contributory negligence (at 198 F. 2d 379) whereas, as was previously noted, Pennsylvania courts do not.

Notwithstanding anything the Second Circuit may have said about *Belden* in *Hedger*, and bearing in mind the difference in references between the New York courts and Pennsylvania courts on the specific point of contributory negligence, there is no question where the Second Circuit now stands on the broader underlying issue involved in the present case. In *Gallagher v. United States Lines Company, et al.*, — F. 2d — (July 6, 1953) the Second Circuit applied New York law in setting aside a verdict for the plaintiff longshoreman in a diversity suit arising out of maritime tort allegedly committed on New York territorial waters. In so deciding the Court held that the "only basis under the law of New York, which governs since the accident occurred within that State, for finding a duty on the

part of United toward Gallagher . . . ." (Slip Opinion, p. 1332) was non-existent under the facts of the case.

Thus the diversity court in New York is bound, as was the Court below, to follow *Caldarola v. Eckert* and apply the substantive law of the state within whose territorial waters the tort occurred.

In support of its conclusion that the Pennsylvania law does not govern the effect of contributory negligence the Court below cites four cases decided prior to *Caldarola*. They are *Garrett v. Moore-McCormack Co.*, 317 U. S. 239; *Seas Shipping Co. v. Sieracki*, 328 U. S. 85; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255 and *Chelentis v. Luckenbach S. S. Co.*, 247 U. S. 372. These cases are not controlling.

Sieracki and *Chelentis* were, in point of fact, cited by this Court in *Caldarola* as evidences of the previously existing lack of clarity among the authorities as to the meaning of the "saving" clause in varying instances (at 332 U. S. 158). *Caldarola* settled the facet of that problem with which we are here concerned. Moreover, *Chelentis*, *Sandanger* and *Garrett* were all seamen's cases. Beyond question, seamen are a favored class. The rights and obligations arising out of their relationship with their vessel are the subject of comprehensive Congressional legislation for their protection. *Isbrandtsen Company v. Johnson*, 343 U. S. 779. The general maritime law has in a real sense simply filled in the interstices of this pattern. It has been developed with a view toward, and subservient to the policy of solicitude prescribed by Congress. Thus the complete body of "seaman's law" is truly an integrated whole, reflecting preeminently a policy expressed by Congress. It is in this light that the cases dealing with seamen's claims must be initially appraised when they are sought to be applied to other classes of controversies.

The *Garrett* case held that the admiralty rules must be applied in determining the validity of a release given by a seaman, which had been set up in defense to a claim for dam-

ages under the Jones Act, and a companion claim for maintenance and cure arising out of the same injuries. The decision turned primarily upon the necessity of uniformity in vindication of rights arising under that Act of Congress. We are not here concerned with rights arising out of an act of Congress. Nor need we quarrel with the proposition that a cause of action for maintenance and cure, which has no counterpart in the substantive law of any state, is properly determined by the law which alone created it. The doctrine is unique in every respect.

Chelentis v. Luckenbach S. S. Co. and *Carlisle Packing Co. v. Sandanger* relied principally upon the doctrine announced in *Southern Pac. Co. v. Jensen*, 244 U. S. 205, to the general effect that state legislation was invalid to the extent that it contravened an express Congressional purpose, or worked prejudice to or interfered with the harmony or uniformity of the general maritime law in its international and interstate relations. The 5 to 4 decision in *Jensen* commenced a heated controversy engendered, no doubt, by the powerful dissents written by Justice Holmes and Justice Pitney. The controversy culminated in *Standard Dredging Corporation v. Murphy*, 319 U. S. 306, where this Court recognized that the doctrine "has no vitality beyond that which may continue as to state workmen's compensation laws" (at 319 U. S. 309).

For present purposes it is worth noting that the decline of the *Jensen* doctrine was marked by cases such as *Grant Smith-Porter Ship Co. v. Rohde*, 257 U. S. 469; *Just v. Chambers*, 312 U. S. 383; *Davis v. Department of Labor*, 317 U. S. 249 and *Parker v. Motor Boat Sales Co.*, 314 U. S. 244, which developed the so-called "maritime-but-local" doctrine which recognized that many controversies arising on navigable waters are matters of legitimate local concern. Indeed, we have concrete evidence of the recognition of this same fact by Congress with respect to the most grievous personal injury—death.

In 1920 Congress passed the Death on the High Seas Act, creating a cause of action for wrongful death occurring thereon. 41 Stat. 537, 46 U. S. C. § 761 et seq. Here it had an opportunity to declare, in effect, that the incidents of that tort, when occurring on waters within the territorial limits of a state, were a matter of national concern. Yet the significant thing is that the Death on the High Seas Act expressly excepts from its operation wrongful deaths occurring, inter alia, on waters within the territorial limits of any state. Section 7. It leaves unaffected the provisions of any state statute giving or regulating such an action. This repels any suggestion that the application of state law to personal injuries occurring on the navigable waters of a state in any way contravenes any overriding legislative policy of the federal government.

Conclusions as to the First Question Presented.

1. There is no established rule of the admiralty governing the effect of contributory negligence upon recovery under the facts of this case. Nor, in accordance with *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, is this an occasion for the approval or announcement by this Court of any admiralty rule at variance with the common law, under which contributory negligence bars recovery.

2. Even if this Court should hold that there is existing an applicable rule in the admiralty, or announce a rule which would be applicable had this suit been brought in admiralty, nevertheless such rule does not apply to the present case. For the reasons discussed hereinabove, the diversity court was bound to apply the substantive law of Pennsylvania in determining the effect of Hawn's contributory negligence upon his recovery. Accordingly, he cannot recover in the present suit.

If either of the foregoing conclusions be sustained, Pope & Talbot is entitled to have judgment entered in its

favor, and against Hawn. In that event, the second and third questions presented by the present writ do not require consideration.

Second Question: Whether Haenn Is Entitled, in Effect, to Indemnify Itself at Pope & Talbot's Expense.

SHOULD THIS COURT DECIDE THAT HAWN IS ENTITLED TO RECOVER FROM POPE & TALBOT, AND SHOULD THIS COURT FURTHER MEASURE HAWN'S RECOVERY BY ANY STANDARD WHICH DOES NOT EXCLUDE IN ITS COMPUTATION THE QUANTUM OF FAULT CONTRIBUTED BY HAENN, POPE & TALBOT IS ENTITLED TO HAVE HAWN'S JUDGMENT AGAINST IT DIMINISHED TO THE EXTENT OF THE COMPENSATION PAYMENTS AND MEDICAL EXPENSES WHICH HAENN WAS OBLIGED TO PAY TO HAWN, OR ON HIS BEHALF, UNDER THE HARBOR WORKERS' ACT.

Hawn's employer, Haenn, had made payments aggregating $5,881.35 to Hawn, or on his behalf, under the Harbor Workers' Act. The stipulated limit of Haenn's liability to Hawn under the Act is $8,331.35 (R. 202a). Under an agreement to which Pope & Talbot is not a party, Hawn is to repay Haenn the sums which Haenn paid him out of his recovery against Pope & Talbot (R. 202a).

Hawn's damages were assessed by the jury under a charge which instructed them to include past loss of wages and medical expenses in computing the recovery (R. 156a). If Hawn were permitted to retain this recovery, in addition to the compensation received from his employer, he would be obtaining a double recovery. Hawn did not urge his entitlement thereto, nor does the Harbor Workers' Act permit an employee to retain both compensation from his employer and damages from responsible third parties. *The Etna*, 138 F. 2d 37 (C. A. 3.); *Fontana v. Grace Line*, 106 F. Supp. 461, affd.—F. 2d—(C. A. 2, June 22, 1953).

If, on the other hand, the injured employee reimburses his employer for compensation act payments out of his recovery against the third party, no injustice is worked—provided the employer's own fault did not contribute to his employee's injury. But here the jury found both Haenn and Pope & Talbot at fault. The decision below permits the negligent employer, although insulated by *Halcyon* from liability for contribution to the shipowner, to secure full indemnity from the shipowner, with the employee the conduit for recovery.

The Court below rejected Pope & Talbot's contention that Hawn's recovery against it be reduced by the sums paid by Haenn to Hawn under the Harbor Workers' Act. In so doing, the Court judicially amended the Act in a manner neither permitted nor required by the *Halcyon* decision. At the same time, it construed the Harbor Workers' Act on a fundamental point in a manner inconsistent with the purpose of the Act.

Nothing in the Harbor Workers' Act contemplates the result reached below. The Act provides for subrogation in the employer in one instance alone: where payment of compensation had been accepted by the employee under an award made in a compensation order filed by the Deputy Commissioner following adversary determination of the employee's rights. In these circumstances, the employee's right of action against the third party passes to the employer, who repays himself out of the proceeds of his suit against the third party. § 33, 33 U. S. Code § 933.

Under no other circumstances does the Harbor Workers' Act provide for subrogation in favor of the employer. Where the employer's own fault was not involved in the casualty, it has been held that he is entitled to subrogation to his employee's recovery, *under equitable principles*. *The Etna*, supra, 138 F. 2d 37. Indeed, the Court below in the *Halcyon* case (*sub nom. Baccile v. Halcyon Lines*, 187 F. 2d 403) recognized that the employer's own fault and subrogation seem inconsistent even in those instances provided for

by the Act, where the employee's right of action passes to the employer by virtue of an award. In discussing the statutory sanction for "the employer's independent right to repay to himself out of his recovery as assignee the compensation already paid to his employee", the Court observed: "But this is in accordance with accepted principles (citing *The Etna*), *to the extent that the employer's own fault is not involved*" (at 187 F. 2d 405; emphasis supplied).

Until the present decision no Court has to our knowledge held or suggested that a negligent employer possesses a right to subrogation where it is not recognized by the statute or justifiable upon any other principle, equitable or otherwise.

The Court below viewed Pope & Talbot's present contention as an attempt to force Haenn's contribution to Hawn's judgment against Pope & Talbot. That is one way of looking at it. The other way, equally logical, is to view Pope & Talbot's contention as going to the more fundamental problem of the correctness of the amount of the judgment in the first instance. That is, the jury based its award, inter alia, upon past loss of wages and medical expenses. To the extent that those items of damage proved had been covered by Haenn's compensation payments, they had not in fact been sustained by Hawn. Yet Pope & Talbot would not have been permitted to prejudice Hawn's claim against it by mentioning "compensation" to the jury. Therefore, to the extent that the jury's verdict paid Hawn for those items actually paid by Haenn under the Harbor Workers' Act, the verdict was in contemplation of law and in fact excessive.

Passing that fact, let us consider for a moment the equities of the situation. The Court below said that Pope & Talbot's contention is an attempt "to accomplish by indirection the exact same result repudiated" in *Halcyon* (R. 242). It reasoned that *Halcyon* prevents recovery of contribution by one of two joint tort feasors against the other,

and that the effect of Pope & Talbot's contention would be to force Haenn's contribution to Hawn's judgment against Pope & Talbot. However, it is evident that the result sanctioned by the Court below is doubly inequitable and doubly offensive to *Halcyon*, for it permitted Haenn to secure not only contribution, but full indemnity from its partner in fault, Pope & Talbot. If *Halcyon* prevents Pope & Talbot from securing contribution from Haenn, even more must it prevent Haenn from indemnifying itself at Pope & Talbot's expense.

Had Haenn been without fault, or solely at fault, it would still have had to make payments to Hawn under the Harbor Workers' Act. By the fortuitous circumstance that Pope & Talbot combined with Haenn and Hawn to produce the latter's injuries, the basic purpose of the Act should not be obliterated so as to impose Haenn's entire responsibility upon Pope & Talbot. Thus the burden of the injured employee, as between the employer and the third party, is made to weigh inevitably and exclusively upon the third party who happens to contribute to the injury of one within the Act. The Harbor Workers' Act does not permit Haenn to recoup its payments under the present circumstances, and fundamental concepts of fairness prevent such a result. And unless Haenn's recoupment finds support in the Harbor Workers' Act, it cannot be supported at all. It is obvious that independent of the asserted right of subrogation under the Act, there exists no possible basis, under tort law or otherwise for a right of indemnity by Haenn against Pope & Talbot.

The only way in which the compensation payments may be treated so as to give effect to the underlying purpose of the Harbor Workers' Act and the *Halcyon* decision is to permit Hawn to retain the compensation payments made to him, or on his account, under the Act, and to reduce the amount of his judgment against Pope & Talbot accordingly.

Third Question: Whether Pope & Talbot Warranted the Seaworthiness of Its Vessel and Her Appliances to Hawn.

THE PRESENT CASE DOES NOT CALL FOR AN EXTENSION OF THE WARRANTY OF SEAWORTHINESS TO ONE IN HAWN'S STATUS. RATHER, IT SUGGESTS THE PROPRIETY OF REAPPRAISAL OF THE DECISION IN SEAS SHIPPING COMPANY V. SIERACKI. THE SIERACKI DECISION SHOULD BE OVERRULED.

In *Seas Shipping Company v. Sieracki*, 328 U. S. 85, this Court held that a shipowner warrants the seaworthiness of his vessel and its appurtenances to an employee of a stevedore contractor engaged in handling the vessel's cargo. The decision below extends this doctrine to an employee of a carpentry contractor engaged in making alterations and repairs to the vessel's special fittings requisite to the carriage of a particular cargo.

This extension of the *Sieracki* doctrine brings the Court below into direct conflict with the Second Circuit, which has repeatedly refused to extend the *Sieracki* rule beyond the limitations placed upon it by this Court. The conflict is evidenced by such Second Circuit cases as *Guerrini v. United States*, 167 F. 2d 352, cert. den. 335 U. S. 843 (Subcontractor's employee engaged in cleaning vessel's boilers and tanks); *O'Connell v. Naess*, 176 F. 2d 138 (Rigger employed by repair contractor); *Rich v. United States*, 192 F. 2d 858 (Tank cleaner); *Martini v. United States*, 192 F. 2d 649 (Ship repair foreman); *Armento v. United States*, 74 F. Supp. 198 (Carpenter employee of repair contractor); and *Cioffi v. New Zealand Shipping Co., Ltd.*, 80 F. Supp. 98 (Ship's carpenter employed by contractor).

The *Sieracki* decision was, of course, an extension of a species of liability without fault to a class of workers other than seamen, to whom alone it had previously applied. The conflict between the present decision and those cited above

is a striking illustration of the difficulties necessarily involved in piling an extension upon an extension.

The *Sieracki* case decided only that the warranty of seaworthiness extended to a well defined class of workers: employees of a stevedore under contract with the vessel owner. The liability was rationalized on the basis that in times past, the work of loading and unloading cargo was performed by seamen. Consequently, it is said, those who today perform this work, although employed by a party other than the vessel owner, should be entitled to the same warranty of seaworthiness which has traditionally extended to seamen.

It is clear that Hawn does not fall within the defined class of persons to whom the doctrine was extended in *Sieracki*. Moreover, there is nothing to show that the work he was performing was traditionally performed by members of the vessel's crew. Nor is there any evidence that he was exposed to any hazard peculiar to a seaman's employment, which was one of the considerations giving rise to the warranty as to seamen in the first instance. Insofar as the shoreside common law is concerned, there is nothing exotic about a hole in the floor.

These factors immediately repel any suggestion that one in Hawn's circumstances was included within the class to whom the warranty of seaworthiness was extended by *Sieracki*.

If the Courts administering the *Sieracki* rule are permitted to go beyond its holding, and borrow its general language in support of the same result in a different type of case, the potential for contrariety of results is practically boundless. Each individual case will turn upon the interpretation placed by the individual Court upon such general language. For instance, if the test is to be, as the Court below suggests (R. 234), that the individual is "rendering services necessary in the performance of the ship's business of carrying cargo," then conceivably the warranty could extend to practically any business invitee coming aboard the vessel while she is in port. We do not believe

that this Court, in *Sieracki*, ever contemplated such a sweeping result. We do not think, for instance, that this Court intended that the warranty would extend to an electronics engineer, employed by a shoreside manufacturer, who visits the vessel perhaps once a year to test and adjust the vessel's radar equipment. Yet the work he is performing is undoubtedly as "necessary in the performance of the ship's business" as that of the manual laborer who loads the cargo. Such is the fallacy in following the general language, rather than the holding of a decision.

Rather than presenting a situation calling for the extension of the *Sieracki* doctrine, we believe the present case suggests the propriety of reviewing the validity of the doctrine itself. The considerations which militate against its logic and its permissibility are forcefully stated in the dissent filed by Chief Justice Stone, concurred in by Mr. Justice Frankfurter and Mr. Justice Burton. The reasons given in the dissent are just as valid, and just as persuasive today as when first uttered. Indeed, to the extent that the dissent relies largely upon the impact of Congressional legislation in the field of longshoremen's rights, and points out the lack of integration therewith which is implicit in the result reached by the majority, the dissent accurately foretold the approach to the whole problem of maritime personal injury which was taken by this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., supra*, 342 U. S. 282. In this light, at least, the decision in *Sieracki* warrants re-examination and, for the reasons advanced in the dissent, should be overruled.

One final point requires attention. The respondent Hawn, in his brief in opposition to the present writ, suggests that the question of the applicability of the doctrine of seaworthiness is moot in the present case. He points out that the jury found that Pope & Talbot was at fault not only by reason of having an unseaworthy vessel, but on the ground of negligence as well. He suggests that since this is so, Pope & Talbot is liable to Hawn in any event.

Depending upon the conclusion reached by this Court as to the first question presented, the present question may or may not become moot. Should this Court hold that Hawn's contributory negligence does not bar recovery, and further hold that the measure of Pope & Talbot's liability is to be based upon any quantitative allocation or apportionment according to the fault of the parties, it obviously makes a great deal of difference whether "fault" can properly be ascribed to Pope & Talbot on the ground of unseaworthiness. If unseaworthiness of the vessel was not properly a species of fault which could be considered in determining the contributions of fault by the various parties to the totality thereof, then any allocation of fault, including that ascribed by the jury to Hawn himself, must necessarily fall.[3]

CONCLUSION.

The judgments of the Court of Appeals in favor of the respondent Charles Hawn, and against the petitioner Pope & Talbot, Inc., should be reversed, and the cause remanded to the District Court with instructions to enter judgment in favor of the petitioner, Pope & Talbot, Inc. and against the respondent Charles Hawn.

Respectfully submitted,

MARK D. ALSPACH,
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Counsel for Petitioner.

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3. Pope & Talbot was granted an exception (R. 149a) by the Trial Judge to his refusal to affirm Pope & Talbot's ninth point for charge (R. 177a) which would have confined Pope & Talbot's liability to the ground of negligence. It was made clear to the Trial Judge (R. 148a) that Pope & Talbot took the position that the doctrine of unseaworthiness does not apply to Hawn.

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IN THE

Supreme Court of the United States

October Term, 1953.

No. 13.

POPE & TALBOT, INC.,
Petitioner,

v.

CHARLES HAWN
and
HAENN SHIP CEILING AND REFITTING CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONER, POPE & TALBOT, INC.

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IN THE

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Petitioner

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CHARLES HAWN

AND

HAENN SHIP CEILING AND REFITTING CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER, POPE & TALBOT, INC.

ARGUMENT.

This reply brief is directed toward answering certain of the arguments advanced by the respondent Hawn which are not covered in petitioner's main brief. Numbers within parentheses refer to pages in Hawn's brief.

1.

The major premise of Hawn's argument appears unobtrusively and unsupported by authority. Yet if this premise is unsound, his whole argument based thereon collapses.

Hawn says (p. 13) that the grant of judicial power of the United States to "all cases of admiralty and maritime jurisdiction" under Article 3, § 2 of the Constitution "im-

plicitly establishes the dominance of the maritime law over state law." As Hawn's subsequent argument discloses, "maritime law" is taken to mean the rules of decision created by the judges of the admiralty courts.

If Hawn's basic contention is sound, then it would likewise mean that the grant of jurisdiction in diversity cases nullifies Erie R. Co. v. Tompkins, 304 U. S. 64. Furthermore, Hawn loses sight of the fact that the Constitutional grant of jurisdiction merely clothes the admiralty courts with the power to hear and determine cases in which their jurisdiction has been invoked. The Constitution says nothing as to the substantive rules to be applied. It left to Congress the function of making the laws "necessary and proper" for carrying into execution the power to hear and determine. Congress, in turn, contented itself with simply specifying which of the federal courts should exercise the power of the United States to hear and determine. Congress likewise prescribed no substantive rules.

Clearly the mere grant of jurisdiction to the admiralty courts carries with it no implications or intimations of supremacy or dominance, for the power of the state courts, and of the federal diversity courts to hear and determine an action such as the present one is likewise unchallenged; indeed, it is expressly recognized by Section 9 of the Judiciary Act of 1789. If grant of jurisdiction is the test, as Hawn suggests, his argument under consideration is unsound unless he is prepared to deny the jurisdiction of the court which he here invoked.

Basically, what Hawn is contending is that he has a right to have his suit determined according to the rules of decision which would have applied if he had chosen to invoke the jurisdiction of the admiralty court. In his view, the mere existence of concurrent jurisdiction in some other court is sufficient to impose its substantive law upon the tribunal which he selected and preferred. This argument is obviously untenable.

II.

In support of the asserted dominance of the "maritime law", Hawn points to the validity of state death statutes as applied to tort on navigable waters (pp. 14-17). Recognizing as he must that such statutes are applied *even in the admiralty courts*, he nevertheless draws a conclusion that does not follow. He says that the recognition of state death statutes in admiralty proves that "it is only where the maritime law does not afford relief that the states are free to deal with the subject" (p. 17).

That this conclusion is invalid is demonstrated by *Just v. Chambers*, 312 U. S. 383, wherein it was held that the principle established by the cases involving state death statutes is

> ". . . that a state, in the exercise of its police power, may establish rules applicable on land and water within its limits, even though these rules incidentally affect maritime affairs, provided that the state action 'does not contravene any acts of Congress, nor work any prejudice to the characteristic features of the maritime law, nor interfere with its proper harmony and uniformity in its international and interstate relations' . . ." (at 312 U. S. 389)

Just v. Chambers rejected the very argument advanced here by Hawn—that the application of a state death statute is permissible only because it fills a "void" in the maritime law. It held that the admiralty court would recognize the survival of a state death action as against the tortfeasor's estate even though the maritime law would have refused to do so. The recognition was held to be neither violative of nor repugnant to the characteristic or essential features of the admiralty jurisdiction.

It must be remembered that *Just v. Chambers* was one of the cases marking the decline of the doctrine announced in *Southern Pacific Co. v. Jensen*, 244 U. S. 205. In this

light, the words of Mr. Justice Holmes, in his original dissent from the *Jensen* doctrine, are peculiarly appropriate:

> "No doubt there sometimes has been an air of benevolent gratuity in the admiralty's attitude about enforcing state laws. But of course there is no gratuity about it. Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right, and if a claim depending upon a state statute is enforced, it is because the state had constitutional power to pass the law. . . ."

Contrast this with Hawn's present assertion (pp. 16-17) that the recognition in admiralty of state death statutes is "*an expression of judicial policy*, that it is desirable to enforce, in admiralty, those species of 'maritime-but-local' state-created rights which do not come into conflict with the maritime law . . ." (Emphasis supplied.) Hawn's correlative observation (p. 17) also demonstrates the fallacy of his own position: "The course thus pursued is one of choice and not one of compulsion, for there is no constitutional or legislative mandate imposing upon courts of admiralty the duty to enforce such rights."

If this is so, then where is the "constitutional or legislative mandate" imposing upon the common law courts the obligation of enforcing the substantive law created by the admiralty courts? Hawn merely assumes that such exists.

Bearing in mind that Hawn's thesis is the "dominance" of the admiralty law over state law, the treatment accorded state death statutes refutes rather than supports his argument. If the admiralty rules are "dominant", they must necessarily prevail over state law to the contrary. Yet in the case of wrongful death, the state statutes permit recovery, whereas the admiralty law most certainly does not. The two bodies of law were diametrically opposed, and the state law prevailed—not by grace of the admiralty judges, but because the state had the power to determine the incidents of the act done upon navigable waters within its jurisdiction.

III.

Hawn cites language from *Workman v. New York*, 179 U. S. 552, in support of his proposition of the "dominance" of the admiralty law irrespective of the forum (p. 17). As the rest of the sentence which Hawn does not quote reveals, the Court was there speaking only of the power of the *admiralty courts* to apply their own rules of decision in cases where their jurisdiction is invoked.

IV.

Hawn cites a number of seamen's cases for the proposition that the federal diversity court must enforce rights arising out of acts upon navigable waters under "substantive admiralty principles" (pp. 20, 21-25). In particular, he underscores the statement in *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372 (p. 25) to the effect that a seaman bringing suit in a common-law court for personal injuries could recover, even if guilty of contributory negligence. This reference is decidedly inapposite when considered out of context. The remainder of the quotation which Hawn omits makes it clear that the "recovery" under discussion was recovery of maintenance and cure and wages to the end of the voyage, as to which the seaman's entitlement has never been dependent upon his freedom from contributory negligence.

Apropos of the *Chelentis* citation, it is significant to note that the court recognized that the "contract of a seaman . . . . has written into it those peculiar features of the maritime law that were considered in the case of *The Osceola*, 189 U. S. 158 . . . . the contract must be the same in every court, maritime or common law" (pp. 24-25). It is in this light that cases such as *Garrett v. Moore-McCormack Co.*, 317 U. S. 239 (p. 21), must be appraised. The *Garrett* case involved only a claim under the Jones Act and, as the *Chelentis* case points out, a claim for maintenance and cure arising from the seaman's contract. Petitioner need not here quarrel with the proposition that a contract

must be "the same" in every court, but we are not here dealing, as in seamen's cases, with rights allegedly arising under a contract.

Robins Dry Dock & Repair Co. v. Dahl, 266 U. S. 449, cited by Hawn (p. 23) does not support his present position that the effect of contributory negligence must be determined under the admiralty law. First of all, the *Robins* case is contrary to *Caldarola v. Eckert*, 332 U. S. 155. Beyond that, the state court in the *Robins* case had unequivocally charged that contributory negligence barred recovery (at 266 U. S. 455-456). While this court disapproved another portion of the charge referred to by Hawn, it said nothing as to the portion of the charge dealing with contributory negligence.

V.

Hawn devotes seventeen pages (pp. 46-62) to an attempt to demonstrate that the rule of loss distribution announced below is in fact the established rule in the admiralty courts. Yet he does not and cannot cite a single case which so holds. The best he can do is indulge in generalities as to what the name of the rule is. He cannot demonstrate what the rule itself is, or how it works.

All of the authorities cited by Hawn which are of any moment are discussed adequately in petitioner's main brief. They do not establish any definitive rule under the facts of this case. Indeed, the best that Hawn can gather from them is an expression of "basic philosophy" (p. 62). It is not oversimplification to point out that this case presents, in the final analysis, a problem in mathematics, not a problem in philosophy. Hawn wants to know how much he gets, and Pope & Talbot wants to know how much, if anything, it must pay. The admiralty authorities do not answer that question.

It is not surprising, therefore, that Hawn is finally driven to asking this Court to formulate a rule. What is surprising is that he professes to support the rule below on grounds of "enlarged principles of justice and equity"

(p. 62). It is significant that he makes no attempt to demonstrate that the result below is either just or equitable. At the same time, his refraining from doing so is understandable, for the decision below defies support on either ground.

Respectfully submitted,

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THOMAS E. BYRNE, JR.,
KRUSEN, EVANS AND SHAW,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, ~~1952.~~ 1953

No. ~~535.~~ 13

POPE & TALBOT, INC.,
Petitioner,

v.

CHARLES HAWN

and

HAENN SHIP CEILING AND REFITTING CORPORATION.

BRIEF ON BEHALF OF CHARLES HAWN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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Supreme Court of the United States.

OCTOBER TERM, 1952.

No. 535.

POPE & TALBOT, INC.,
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CHARLES HAWN
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BRIEF ON BEHALF OF CHARLES HAWN IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

ARGUMENT.

The Third Question Alleged to Be Presented Is Moot and Is Therefore Not Appropriate for Review by This Court.

Petitioner requests this Court to review the judgment below upon three grounds (Questions Presented (Petition, pp. 6-7)). The present brief concerns itself solely with the third question presented. In thus restricting the scope of this brief, respondent Hawn does not intend to imply that the first two questions are appropriate for review by this Court. We merely refrain from commenting upon them at this stage of the proceedings.

Petitioner states the third question presented to be as follows:

> "Is the warranty of seaworthiness owing by a shipowner to employees of a stevedore under Seas

Shipping Company v. Sieracki, 328 U. S. 85, likewise owing by a shipowner to an employee of a carpentry contractor engaged in alterations and repairs to a vessel's fittings?" (Petition, pp. 6-7).

Our opposition to a review of this question is based upon the ground that the issue of unseaworthiness has become moot and, consequently, in the present posture of the case the question is not in fact presented to this Court.

This case was tried to a jury, which returned a special verdict in favor of respondent. The jury specifically found, in answers to certain interrogatories submitted to them, that (a) the S. S. "John Dickinson" was unseaworthy, and (b) the petitioner Pope & Talbot, Inc. was negligent (Rp 180a).[1] The Court of Appeals sustained both findings (Rh 59-60, 61), and, consequently, the judgment below rests upon both negligence and unseaworthiness. But the petitioner does not here attack the finding of negligence; it presents no question for review relating to that issue. The judgment below must therefore stand even assuming (though, of course, in no sense conceding) that it is not supportable on the finding of unseaworthiness.

We respectfully suggest, therefore, that the Petition for Certiorari does not in fact present to this Court any question relating to the issue of unseaworthiness, and, consequently, that question is not appropriate for review by this Court.

Respectfully submitted,

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Charles Hawn.

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1. We are here following the mode of designating the record adopted by Petitioner (Petition, pp. 1-2, footnote).

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Petitioner,

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CHARLES HAWN

and

HAENN SHIP CEILING AND REFITTING CORPORATION.

BRIEF ON BEHALF OF HAENN SHIP CEILING AND REFITTING CORPORATION IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI.

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Supreme Court of the United States.

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POPE & TALBOT, INC.,

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CHARLES HAWN AND HAENN SHIP CEILING AND REFITTING CORPORATION.

BRIEF ON BEHALF OF HAENN SHIP CEILING AND REFITTING CORPORATION IN OPPOSITION TO THE PETITION FOR WRITS OF CERTIORARI.

ARGUMENT.

I. The Judgment of the Respondent Hawn Should Not Be Reduced Because He Is Entitled to Compensation Benefits.

Three questions are presented by the Petition (Petition, pp. 6-7). In view of the fact that the petitioner does not challenge the reversal by the Court of Appeals of the judgment in its favor against Haenn Ship Ceiling and Refitting Corporation (hereinafter referred to as Haenn), the first and third questions presented by the petition do not concern the respondent Haenn and no argument is here presented in regard to those two questions.

This brief is addressed solely to the second question (Petition, p. 14) which raises the contention that the judgment of the respondent Hawn should be reduced in an amount equal to the benefits he is entitled to receive under the Longshoremen's and Harbor Workers' Compensation Act.

The basis of this contention is that because Haenn was negligent it should not enjoy its right of subrogation.

Although Hawn elected to sue the petitioner the respondent, Haenn, continued to pay compensation, as provided by the Act, under an agreement that Hawn would repay all sums paid for medical treatment and compensation out of any recovery made by him.

The petitioner contends that it is being required to pay for Haenn's fault as well as its own. This argument is not sound as the judgment only reflects full compensatory damages for Hawn, and the compensation payments are not included in the amount of such damages except to the extent of medical expenses amounting to $831.35 (Rp 202a, Rh 69). Had the respondent Haenn not paid any compensation it must be presumed that the compensatory damages awarded to Hawn would have been in the same amount. The fact that there was an agreement between Hawn and Haenn that the latter would continue to pay compensation notwithstanding the election to sue the petitioner is a circumstance which has had no effect on the petitioner's liability or the amount of damages awarded against it.

Without regard to the agreement between Hawn and Haenn, the latter is entitled to be subrogated to the extent of payments made under the Longshoremen's and Harbor Workers' Compensation Act even though that Act, in terms, does not specifically mention subrogation where the employer voluntarily pays in accordance with the spirit and requirements of the Act. (*The Etna*, 138 F. 2d 37, 40.)

If the petitioner's contention is upheld, it would result in an employer being deprived of his subrogation because he complied with the Act in making payments to his injured employee.

It is therefore clear that the respondent Haenn is not obtaining "indemnity" from the petitioner, who is doing nothing more than paying compensatory damages. It is legally no concern of the petitioner whether the respond-

ent Haenn, or some other thirty-party, by assignment, is to share in those damages. The petitioner is paying the price of its own fault which is not reduced or increased by reason of Haenn's subrogation interest in the judgment.

The petitioner here, by asking that Hawn's judgment be reduced, is attempting to obtain, in effect, a contribution from Haenn. The Court of Appeals said (Rh 69):

> "What appellant actually seeks under this point is to accomplish by indirection the exact same result repudiated in Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U. S. 282."

It is contended that it would be inequitable for the respondent Haenn, being negligent, to be fully reimbursed for all payments made by it under the Act. This argument loses sight of the fact that Haenn was obligated by law to make the payments without regard to its fault. This Court has held where the parties are situated as they are here that an employer covered by the Act is not obligated to contribute because it might be a joint tortfeasor, and that in the absence of statute it would be inappropriate to hold otherwise. *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation*, 342 U. S. 286-287.

II. Conclusion.

It is therefore respectfully submitted that the petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1953.

No. 13.

POPE & TALBOT, INC.,
Petitioner,

v.

CHARLES HAWN
and
HAENN SHIP CEILING AND REFITTING CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT HAWN.

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IN THE

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v.

CHARLES HAWN

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HAENN SHIP CEILING AND REFITTING CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT HAWN.

OPINIONS BELOW.

The opinion of the District Court is reported in 99 F. Supp. 226. A supplemental opinion is reported in 100 F. Supp. 338. The opinion of the Court of Appeals is reported in 198 F. (2d) 800.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 1254 (1) and 2101 (c) of Title 28, U. S. Code.

STATEMENT OF THE CASE.

The petitioner's statement of the case adequately presents the facts.

SUMMARY OF ARGUMENT.

First Question—The Effect of Hawn's Contributory Negligence.

It is respondent's position that where a federal court, exercising jurisdiction in maritime affairs, is called upon to adjudicate a claim of maritime origin, to which is annexed as an inseparable incident the right to recover irrespective of contributory negligence, the law to be applied is the admiralty rule of comparative negligence, and not the common-law rule of contributory negligence under which recovery would be completely barred.

It is the basic tenet of respondent's position that our dual system of government cannot successfully function unless the coordinate systems of law which it engenders are permitted to operate in harmony and without serious conflict, and that this can be achieved only by maintaining the proper distribution of judicial power between state and federal courts. This fundamental philosophy runs through the entire body of judicial decision in this field of the law. Expressed in broad terms it means the supremacy of state law in the field of rights deriving solely from the states, and correspondingly, the supremacy of federal law in the field of federally-created rights, irrespective of the forum which is utilized for their determination. Just as in the *Erie R. Co. v. Tompkins* (304 U. S. 64, 82 L. Ed. 1188) line of decisions this Court irrevocably established the supremacy of state law in federal courts adjudicating state-created rights, so has this Court in an unbroken line of decisions established the supremacy of the maritime law, irrespective of the forum. *Panama R. Co. v. Johnson*, 264 U. S. 375; *Garrett v. Moore-McCormack Co.*, 317 U. S. 239; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255; *Chelentis v. Luckenbach Steamship Co.*, 247 U. S. 372; *Socony-Vacuum Oil Co. v. Smith*, 305 U. S. 424; *Robins Dry Dock*

& Repair Co. v. Dahl, 266 U. S. 449; *Seas Shipping Company v. Sieracki*, 328 U. S. 85.

Nor is this established doctrine in any way affected by the decision of this Court in *Caldarola v. Eckert*, 332 U. S. 155, upon which the petitioner relies. That case was not concerned with the question of state law versus maritime law at all. It turned solely on the right of a state court to decline to entertain a federal claim, under the authority of the decision of this Court in *Douglas v. New York, N. H. & H. R. Co.*, 279 U. S. 377. *Nothing decided or intimated in Caldarola lends the slightest support to the contention that a federal court exercising jurisdiction over maritime matters, when called upon to enforce the same claim, must likewise refuse to entertain it, or that it must look to state law for the governing rules of liability.* The most recent decision of this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282, irrevocably establishes the contrary. In that case, *initiated in a federal diversity Court*, the problem presented was the existence and extent of contribution between joint tort feasors in a maritime non-collision case. This Court determined that no such right existed *under the maritime law*, and in deciding the question not only ignored the state law and the result that would have been reached in the state court, but in no sense considered itself bound by state law.

As an alternative to its position on state versus maritime law, petitioner contends that *even under the maritime law*, Hawn's contributory negligence must bar recovery. The argument is predicated on the assumption that the comparative negligence rule does not exist in definitive form in the admiralty, and that even if it does it encompasses a tri-partite rule of loss distribution where, as here, three parties have been found to be at fault; that since under the decision of this Court in *Halcyon, supra*, the right of contribution does not exist as between Pope & Talbot and Haenn, the loss sustained by Haenn cannot be distributed among all the parties at fault; and that inas-

much as under the Halcyon principle this Court cannot formulate such a tri-partite rule, the common-law rule of contributory negligence must be applied.

The answer to this contention is that there is in fact an established rule of comparative negligence in admiralty. *The Arizona v. Anelich*, 298 U. S. 110; *Beadle v. Spencer*, 298 U. S. 124; *Socony-Vacuum Oil Co. v. Smith, supra*, 305 U. S. 424. Furthermore, the assumption is wholly unwarranted that the comparative negligence rule, either in conception or in its evolution, envisions a comprehensive loss-distribution scheme, and that unless all parties are saddled with a share of the loss, its application is anomalous and foreclosed. There is a total and complete absence of authority, either in the literature or in the decided cases, which would lend the slightest support to the suggestion, here made for the first time in this case, that the rule is in any sense or to any degree integrated into the rights of contribution which may or may not exist as between joint tortfeasors.

Finally, as to the effect of the *Halcyon* decision, petitioner overlooks one vital fact, namely, that established rules exist in admiralty for the complete disposition of the rights and liabilities of all of the parties to this litigation. For whatever the measure of Hawn's recovery might be against Pope & Talbot under the maritime rule, *it does not bar recovery altogether: The Max Morris*, 137 U. S. 1; *The Arizona v. Anelich, supra; Beadle v. Spencer, supra; Socony-Vacuum Oil Co. v. Smith, supra.* And so far as Pope & Talbot's rights against Haenn are concerned, Halcyon establishes that no right of contribution exists. So that in no event is this Court faced with the problem, presented in Halcyon, of fashioning new rules hitherto unknown to the maritime law.

Finally, Congress cannot here, as in Halcyon, furnish the solution to the present problem. *For so long as Hawn's contributory negligence does not bar recovery, some rule*

of apportionment must be applied **even if it must now for the first time be formulated. This Court cannot await Congressional action before determining wha. rule of apportionment is to be applied.**

Second Question—May Hawn's Judgment Be Reduced by the Amount of "Compensation" Payments Made by His Employer Haenn?

Petitioner views the question as one involving indemnity between Haenn and Pope & Talbot. No such question is presented in this case. The payments made by Haenn were not compensation payments required under the Harborworkers' Act. In view of Hawn's election to proceed against Pope & Talbot, under Section 933 (a), they were purely voluntary, made in consideration of Hawn's promise to repay out of any sums recovered from petitioner. As a matter of fact, since the judgment exceeds the limit of compensation liability under the Act, Haenn could not, at any time, have been liable for the payment of any compensation whatsoever: Section 933 (f). There is absolutely nothing in the provisions of that Act, or in the policy underlying its purposes, which would justify striking down the agreement between Hawn and Haenn. Under these circumstances, it would be unconscionable to foreclose Haenn from recovering what is in effect nothing more nor less than a loan, made in good faith, by reducing Hawn's judgment as suggested by petitioner.

Third Question—The Application of the Doctrine of Unseaworthiness.

It is Hawn's position that this question is moot, since the judgment below rests upon findings of both negligence and unseaworthiness, and petitioner does not here attack the finding of negligence.

Over and beyond this, we do not believe that the doctrine enunciated by this Court in *Seas Shipping Company*

***v. Sieracki*, 328 U. S. 85, can validly be narrowed to exclude from its scope a longshore worker in Hawn's status. The distinction sought to be drawn between Hawn and Sieracki is untenable.**

Finally, there is not the slightest warrant for *overruling Sieracki*, as the petitioner now for the first time in its present brief contends.

Argument.

FIRST QUESTION: HAWN'S CONTRIBUTORY NEGLIGENCE DOES NOT BAR RECOVERY OF DAMAGES: IN A MARITIME CAUSE OF ACTION BROUGHT IN A FEDERAL COURT EXERCISING JURISDICTION IN MARITIME AFFAIRS THE COMPARATIVE NEGLIGENCE RULE IS APPLICABLE WHETHER THE ACTION IS PROSECUTED IN ADMIRALTY OR AT LAW.

(A) In a Maritime Cause of Action, All of the Substantive Admiralty Rules Apply, Irrespective of the Forum.

The subject matter of the present suit is a maritime tort, *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208. It seeks to enforce a right created and sanctioned by the maritime law and cognizable in admiralty through a common law remedy, i. e., a civil action with trial by jury, "saved" under Section 9 of the Judiciary Act of 1789 (Old Title 28 U. S. C. A. Secs. 41, 371, repealed and re-enacted in substantially similar form in present Title 28 U. S. C. A. Sec. 1333). The question squarely raised for decision is whether, in a maritime cause of action brought on the civil side of the federal district court[1] plaintiff's contributory negligence bars recovery according to the course of the common law, or merely serves to mitigate damages under the principles of the general maritime

1. In our view it is not decisive for present purposes whether jurisdiction here is considered as based upon diversity of citizenship only, or is considered as "arising under the Constitution or laws of the United States". Compare *Jardine v. Walling*, 185 F. 2d 662 (C. A. 3) with *Doucette v. Vincent*, 194 F. 2d 834 (C. A. 1). For the sake of avoiding entanglement in this problem, the present discussion will be cast in terms of diversity jurisdiction, although this hypothesis is probably less favorable to the plaintiff.

law. The answer to this question is of the utmost consequence, for it cuts to the roots of a problem which, unless clearly understood and correctly resolved, can seriously impair the proper balance between the national and state governments, a balance sought to be crystallized and preserved throughout the past one hundred seventy years of judicial and legislative history. As this Court recently pointed out in *Garrett v. Moore-McCormack Co.*, 317 U. S. 238, 245, 87 L. Ed. 239, 243, it has been the constant objective of our legislation and jurisprudence to assure litigants full protection *for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates.*

Because of the unique structure of our dual form of government, avoidance of entanglement between state and federal law has been a difficult task. The initial sharp conflict between the Federalists and States-righters which attended the division of powers into two co-ordinate systems has survived to the present day, although with diminishing intensity. It is, therefore, understandable that a major preoccupation of both legislators and the judiciary has been directed toward isolating the respective spheres in which state and federal law must be mutually exclusive.

It is the basic tenet of plaintiff's position that a dual system of government, such as ours, cannot successfully function unless the co-ordinate systems of laws which it engenders are permitted to operate side by side in harmony and without serious conflict, and that such harmony can be achieved only by maintaining the proper distribution of judicial power between state and federal courts and by recognizing the distinct spheres in which these respective systems of laws are to operate to the mutual exclusion of each other. This fundamental philosophy runs through the entire body of judicial decisions in this field of the law; expressed in broad terms it means the supremacy of state law in the field of state-created rights, and, correspondingly, the supremacy of federal law in the field of federally-

created rights, irrespective of the forum which is utilized for their determination.

The maritime law is, under the Constitution, the law of the United States, and not the law of the several states; therefore, rights arising under the maritime law fall into the sphere of federally-created rights: *Panama R. Co. v. Johnson,* 264 U. S. 375, 385-386, 68 L. Ed. 748, 752. The history of the Constitution and of the Judiciary Act of 1789 demonstrates that strong pressures were exerted by the states-righters to secure for the common law courts of the states the widest possible jurisdiction, even in the field of federally-created rights. A research scholar has expressed the view that no part of the federal jurisdiction sustained so strong an attack from the Anti-Federalists as the grant of diversity jurisdiction to the federal judiciary by the Constitution.[2] The effect of these pressures manifested itself in numerous provisions of the Judiciary Act, two of which bear directly upon the present problem. The first is the "saving to suitors" clause (Section 9 of the Judiciary Act of 1789, *supra,* present Title 28 U. S. C. Sec. 1333) which gave the district courts original and exclusive jurisdiction "of all civil causes of admiralty and maritime jurisdiction, *saving to suitors in all cases the right of a common law remedy where the common law is competent to give it . . .*" The second is Section 34 of the Judiciary Act of 1789, which is commonly referred to as the Rules of Decision Act (old Title 28 U. S. C. Sec. 725, present Sec. 1752). This section was framed to allay the fears of the Anti-Federalists, who were apprehensive of encroachment upon state law by the federal diversity courts. It provided as follows:

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2. Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789" (1923) 37 Harvard L. Rev. 49, 81. This piece of research was to be largely responsible for the landmark decision in *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, to be discussed later.

> "The laws of the several States, *except where the Constitution, treaties or statutes of the United States otherwise require or provide* shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

These two sections of the Judiciary Act laid the conditions which made it possible to entangle state and federal law, for it enabled state courts to adjudicate federally-created rights, and federal courts to adjudicate state-created rights. Other statutes, later enacted (such as the Federal Employers' Liability Act, 45 U. S. C. A. Sec. 51, 56) which gave to the state courts concurrent jurisdiction to adjudicate diverse federally-created rights, merely broadened the potentialities for confusion. Perhaps nothing so clearly demonstrates the judicial struggle with the problem of establishing and maintaining a proper balance between the state and federal governments as the parallel courses taken respectively by the Rules of Decision Act and the "saving to suitors" clause through the adjudications of this Court. Because of the broad scope of the subject, it will be treated here only in its most immediate application.

(1) Despite the underlying policy which requires state law in its substantive aspects to be applied in diversity cases involving state-created rights, this Court, for a period of some one hundred years beginning with *Swift v. Tyson*, 16 Pet. (U. S.) 1, 10 L. Ed. 865 (1842), laboring under basic misconceptions, followed the theory that under the Rules of Decision Act the federal courts, in diversity cases involving state-created rights, are required to apply the *statutory* local law only, and are not required to follow the unwritten law of the states; that there is a body of federal common law, not necessarily conforming to the laws of any state, which the federal courts are free to apply in such cases. The defects, both political and social, revealed by the continued application of this doctrine for close to a century,

coupled with new light thrown upon the history of the Judiciary Act of 1789 by the researches of Charles Warren (*supra,* footnote 2) impelled this Court in 1938 to overrule the *Swift v. Tyson* doctrine in *Erie R. Co. v. Tompkins* (*supra,* footnote 2) 304 U. S. 64, 82 L. Ed. 1188, and to re-establish the principle that in all matters involving state-created rights the federal courts exercising jurisdiction in diversity cases must apply as their rules of decision both the common and statutory law of the state in which the cause of action arises.

The full import of this decision was revealed in *Guaranty Trust Company of New York v. York,* 326 U. S. 99, 89 L. Ed. 2079 (1945), where this Court was faced with determining whether in a diversity case, involving an equity proceeding brought to enforce a state-created right, the diversity court was bound by the state statute of limitation. In holding for the application of the state statute this Court, through Mr. Justice Frankfurter said:

> (U. S. p. 101, L. Ed. p. 2082) "Our starting point must be the policy of federal jurisdiction which *Erie R. Co. v. Tompkins* . . . embodies. In overruling *Swift v. Tyson,* 16 Pet. (U. S.) 1, 10 L. Ed. 865, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. *It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare.*
>
> . . . . . .
>
> (U. S. pp. 108-109, L. Ed. p. 2086) "*Here we are dealing with a right to recover derived not from the United States but from one of the states.* When, because the plaintiff happens to be a non-resident such a right is enforceable in a federal as in a state court, the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. But since a federal court *adjudicating a state-created right solely because of the diversity citizenship*

of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made unavailable by the State nor can substantially affect the enforcement of the right as given by the State.

"And so the question is not whether a statute of limitation is deemed a matter of 'procedure' in some sense. The question is whether such a statute merely concerns the manner or the means by which a right to recover, as recognized by the State, is enforced or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, *does it significantly affect the result of a litigation for a federal court to disregard a law of a state that would be controlling in an action upon the same claim by the same parties in a State court?*

"It is therefore immaterial whether statutes of limitations are characterized as 'substantive' or 'procedural' in State Court opinions in any use of those terms unrelated to the specific issues before us. Erie R. Co. v. Tompkins was not an endeavor to formulate scientific legal terminology. *It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts.*" (Emphases supplied.)

Without attempting here to undertake a case by case exposition of the host of decisions which have applied the *Erie R. Co. v. Tompkins* doctrine in all of its variegated phases, it may be stated broadly that today the courts are faithfully attempting to adhere to the basic policy behind the Act in observing the line of demarcation between the domains of state and federal law in diversity cases involving state-created rights. The ultimate expressions of this policy are to be found in cases such as *Klingseisen v. Costanzo Transportation Co.*, 101 F. (2d) 902 (C. A. 3). Because brought in an admiralty court, this case was not con

trolled by the Rules of Decision Act. Nevertheless, in that case, involving an action for wrongful death of an occupant of a motor boat, over which the admiralty court assumed jurisdiction because of the locality of the tort, but for which the right of recovery was created by the Pennsylvania death acts,[3] the Court barred recovery because of the contributory negligence of the decedent, applying what it considered to be the Pennsylvania rule of contributory negligence instead of the maritime rule. Thus, the Court here, recognizing that the right which it was called upon to enforce was rooted in state law, disposed of the case upon the common law principles of the state, despite the fact that the cause of action was being asserted in admiralty; and this it did, not because required to do so by the Rules of Decision Act, but in recognition of the policy behind the doctrine of dominance of state law in the field of state-created rights irrespective of the choice of forum. See also *Publicker Commercial Alcohol Co. v. Independent Towing Co.*, 165 F. (2d) 1002, 1004 (C. A. 3).

(2) Turning now to the "saving to suitors" clause of the Judiciary Act, it will be recalled that under Article 3, Section 2 of the Constitution the judicial power of the United States extends to "all cases of admiralty and maritime jurisdiction." This grant of judicial power implicitly establishes the dominance of the maritime law over state law. Nevertheless, there are early adjudications which exhibit something of the same kind of confusion which attended the early interpretations of the Rules of Decision Act. This confusion appears to have a dual origin. In one aspect it is attributable to the same kind of thinking and the same kind of judicial climate which was responsible for the extended sway of the *Swift v. Tyson* doctrine. In its second aspect it is chargeable to a more subtle and less readily discernible error to which the immediate inquiry

3. As will presently appear, the general maritime law does not afford redress for wrongful death.

will be directed. Essentially, the error flows from the circumstance that courts of admiralty, because of certain policy considerations, have undertaken to recognize and enforce a limited species of state-created rights for which the general maritime law affords no redress, but over which the admiralty may properly assume jurisdiction because of the maritime character of the tort. That federal courts recognize state law as *permissibly* applicable in *this* area of maritime activity is no warrant for concluding that they are *bound* to apply state law in other maritime matters. Yet this is the character of the confusion in thinking which has attended the subject in some quarters.

The Courts early recognized that the maritime law is not a complete and perfect system and that, particularly in the field of tort liability for personal injuries resulting in death, there was a considerable hiatus in the admiralty law which left the dependents of a deceased maritime worker without redress, for under the general maritime law there is no right of action for wrongful death. *The Harrisburg,* 119 U. S. 199, 30 L. Ed. 358; *Butler v. Boston & Savannah S. S. Co.,* 130 U. S. 527, 32 L. Ed. 1017. Many of the states had early enacted various versions of Lord Campbell's Act, creating a cause of action for wrongful death, in order to bridge a similar gap in the common law. But Congress had for many years remained silent on the subject with respect to the maritime law, and therefore question early arose whether a state court, proceeding via a common law remedy under the "saving to suitors" clause, possessed the power to enforce a state-created right of action for wrongful death resulting from injury growing out of a maritime tort committed either within its territorial limits, or extra-territorially by one of its citizens, when the maritime law did not afford such relief. In *American Steam Boat Co. v. Chace,* 16 Wall. 522, 21 L. Ed. 369, this Court answered the question in the affirmative, holding (a) that where the maritime law does not provide a right of action for a maritime tort, the fact that admiralty courts

exist and exercise jurisdiction over causes of action, leaves the state courts as free to provide relief in such cases as if the admiralty courts were unknown to our Constitution and had no existence in our jurisprudence, and (b) the fact that the right of action is created by a state statute subsequent to the passage of the Judiciary Act does not foreclose such power in the state courts, for the operation of the "saving" clause is not limited to causes of action known to the common law at the time of the passage of the Judiciary Act . . . that which is "saved" by the Act is a common law remedy and not a *right of action* at common law.[4]

As might have been anticipated, question likewise arose whether an admiralty court would respect the same right, created by state statute, where the matter is properly brought before it for adjudication, as e. g., in a limitation of liability proceeding. For many years the lower federal courts had been in conflict on this question (see discussions in *The Harrisburg, supra,* and *Butler v. Boston & Savannah S. S. Co., supra*). In *Old Dominion Steamship Co. v. Gilmore* (*The Hamilton*), 207 U. S. 398, 52 L. Ed. 264, this Court answered this question likewise in the affirmative,

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4. See *The Moses Taylor*, 4 Wall. (U. S.) 411, 431, where this Court said of the "saving" clause:

> "That clause only saves to suitors 'the right of a common law remedy where the common law is competent to give it.' It is not a remedy in the common law courts which is saved, but a common-law remedy . . . The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim: a remedy is the means employed to enforce a right to redress an injury . . . Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law."

and thus laid the problem at rest. The decision was placed upon the rationale that where state law creates a personal obligation and imposes a personal liability for conduct within its territorial limits, or upon extraterritorial conduct by its citizens, of such character as might constitutionally be enforced through a common law remedy in the state courts, admiralty will respect and enforce it, in the absence of Congressional action. This doctrine, i. e., the *permissible* application of local law to those maritime subjects of a local character which remain untouched by the maritime law, is now firmly established, subject however, to prescribed limits, namely, that the local law must not conflict with the maritime law, nor work any prejudice to its characteristic features, nor interfere with its proper harmony in its international and interstate relations. In *Just v. Chambers*, 312 U. S. 583, 85 L. Ed. 903, this Court recently thus defined the policy of admiralty in relation to this problem:

> (U. S. p. 387-388, L. Ed. p. 907) ". . . it is not a principle of our maritime law that a court of admiralty must invariably refuse to recognize and enforce a liability which the state has established in dealing with a maritime subject. On the contrary there are numerous instances in which the general maritime law has been modified or supplemented by state action, as e. g. in creating liens for repairs or supplies furnished to a vessel in her home port. . . . With respect to maritime torts we have held that the state may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."

To summarize the situation, therefore, courts of admiralty have declared, as an expression of judicial policy, that it is desirable to enforce, in admiralty, those species

of "maritime-but-local" state-created rights which do not come into conflict with the maritime law: the judicial power of courts of admiralty, responding to progressive changes in standards of justice may, within certain limits, recognize and enforce a liability which a state has established in dealing with a maritime subject. The course thus pursued is one of choice and not one of compulsion, for there is no constitutional or legislative mandate imposing upon courts of admiralty the duty to enforce such rights. In brief, the admiralty courts have resolved that in the broad interests of justice it is desirable to recognize and enforce those species of state-created rights which have no counterpart in the maritime law and which do not run afoul of constitutional or Congressional sanctions. It is evident from the foregoing considerations that this policy may be utilized only to expand the rights of maritime workers and not to restrict them. For it is only where the maritime law does not afford relief that the states are free to deal with the subject.

But it is a serious error to transmute what is permissible into a positive requirement, and the error is compounded when the attempt is made in a field where this policy can have no possible application (i. e., where the court is dealing with a *maritime* right and not with a *state-created* right of maritime-but-local character) and where, moreover, precisely because the right arises out of the maritime law, governing rules already exist in the admiralty. For in such case the recognition and enforcement of local law, in the face of subsisting maritime law must necessarily lead to a clash between the two, with the resulting subjugation of the latter. In the language of this Court in *Workman v. New York*, 179 U. S. 552, 563, 45 L. Ed. 314, 321: ". . . such cases afford no foundation for the proposition that state laws or decisions can deprive an individual of a right of recovery for a maritime wrong which, under the general principles of the admiralty law, he undoubtedly possessed. . . ."

Two early decisions of this Court appear to have fallen into this kind of error: *Atlee v. Packet Co.*, 88 U. S. 389, 22 L. Ed. 619 and *Belden v. Chase*, 150 U. S. 674, 37 L. Ed. 1218. Both cases subscribe to language, by way of dicta, that although the doctrine in admiralty in collision cases requires an equal division of damages where mutual fault exists, the rule at law will result in a complete denial of recovery. Petitioner concedes that Atlee was dictum, but contends that this was made a rule of decision in *Belden v. Chase*. We believe this is an erroneous view.[5] But whether

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5. In *Belden v. Chase* the owner of the steamboat "Charlotte Vanderbilt" brought an action in the Supreme Court of New York against the owner of the Yacht "Yosemite", claiming that the "Yosemite" was so negligently navigated as to run down and sink the "Vanderbilt". At trial a verdict was rendered in favor of the plaintiff for the full value of the "Vanderbilt", and the judgment was affirmed by the highest court of the state. The case reached the Supreme Court on a writ of error which claimed denial by the state courts, of rights under the federal statutory rules of navigation in two respects: (a) in that the trial judge had erroneously charged the jury with respect to the meaning of the rules insofar as they related to the requirement of carrying certain running lights, as a result of which the "Yosemite" was erroneously found to have been at fault in not carrying range lights under Rule 7, and (b) in that, with respect to the second basis of asserted liability, namely, the charge that the "Yosemite" was negligent in the manner in which it was maneuvered at the time the two vessels were passing, the issue of the "Vanderbilt's" negligence was submitted to the jury under a general charge of negligence without giving any force to the rules of navigation relating to duties and obligations of passing vessels. As to the first claimed error, the Supreme Court held that the "Yosemite" had the necessary lights under Rule 3 and was not governed by the requirements of Rule 7, and that therefore, as a matter of law, she was not at fault in failing to carry range lights. As to the second claimed error, the Supreme Court held that the refusal to give certain requested instructions, taken together with the actual instructions given, resulted in the submission of the

decision or dicta, the views expressed by this Court in these cases may not be ignored. We believe, however, that viewed in retrospect in the light of numerous more recent decisions of this Court the error will become manifest. For rights and obligations arising from maritime collisions are not state-created rights; they are rights rooted in the maritime law. Consequently, the Court was not here dealing with exclusively state-created rights for which no counterpart exists in the maritime law, but with established rights and obligations *arising out of the maritime law.* Since the doctrine of divided damages in collision cases is one of the characteristic features of the maritime law, the application

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issue of the "Yosemite's" negligence without taking into consideration the force of the Rules of Navigation and consequently resulted in the denial of a federal right. The judgment was therefore reversed and the cause remanded for further procedings. It is thus evident that the Court did not, and in the posture of the case before it, could not, undertake to decide the effect of the "Vanderbilt's" contributory negligence, if any, upon plaintiff's right to recover. In point of fact, the defendant attempted to argue that on the plaintiff's own showing the "Vanderbilt" was palpably negligent and that, therefore, defendant's motion for a directed verdict should have been sustained. Of this contention, the Supreme Court said (U. S. p. 700): ". . . *we do not care to pass upon that question,* and content ourselves with indicating certain errors in the rulings of the trial court, which appear to us to so essentially deprive the rules of the force which should have been given them as to amount to a decision against rights claimed under the statute of the United States." It was in one of the introductory paragraphs of the opinion (U. S. p. 691) containing a general discussion of the nature of the action, that the Court remarked, by way of dictum, that although the doctrine in admiralty in collision cases requires an equal division of damages where mutual fault exists, the rule at law is different and requires a complete denial of recovery, citing *Atlee v. Packet Co., supra.*

The Court below concurs in the view that the point under consideration was treated in both cases by way of dicta. R. 239.

of the common law rule of contributory negligence would manifestly subject the maritime law to state domination and would, consequently, fly in the teeth of constitutional sanctions. In brief, the error here made was predicated upon a double misconception: (a) the situation did not involve that area in which the policy of admiralty with respect to maritime-but-local state-created rights is applicable, and (b) even if hypothetically applicable, its application is foreclosed by constitutional prohibitions.

As in the case of the *Swift v. Tyson* doctrine, this Court was inevitably led to perceive, in the light of subsequent experience, that the supposed rule adverted to in *Atlee v. Packet Co.* and *Belden v. Chase* is incompatible with the necessary dominance of the maritime law in our dual system of government. Today the rule is firmly established that when a federal diversity court is called upon to adjudicate *rights arising out of the maritime law*, these rights must be enforced under substantive admiralty principles for in such case the diversity court is not a forum alternative to the state courts enforcing state-created rights. It is a forum alternative to the admiralty courts enforcing maritime rights. In brief, the same fundamental considerations which impelled the Supreme Court in *Erie R. Co. v. Tompkins, supra*, and the long line of cases which have followed in its wake, to overrule the case of *Swift v. Tyson*,[6] and thereby to establish the doctrine of supremacy of state law in the field of state-created rights, inevitably establish the supremacy of federal law (in this instance the maritime law) in the field of federally-created rights. Today this Court consistently applies these principles in

6. "In overruling *Swift v. Tyson*, 16 Pet. (U. S.) 1, 10 L. Ed. 865, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare."

Mr. Justice Frankfurter, speaking for the majority in *Guaranty Trust Co. v. York, supra*, at U. S. p. 101.

litigation involving maritime rights, as a review of the more recent leading cases clearly discloses.

Garrett v. Moore-McCormack Co., 317 U. S. 239, 87 L. Ed. 239, involved a suit by a merchant seaman, brought in the Court of Common Pleas of Philadelphia County, for damages resulting from personal injuries, *and for maintenance and cure.* One of the defenses raised was the execution, by the seaman, of a complete release of all claims. After verdict for plaintiff, the court entered judgment for defendant n. o. v. on the ground that plaintiff had failed to sustain the burden of proof required under Pennsylvania law to invalidate the release. Under the Pennsylvania rule, a written release may not be set aside except upon evidence which is "clear, precise and indubitable", whereas under the maritime law the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The Supreme Court of Pennsylvania affirmed the judgment on the theory that the rule as to burden of proof regarding releases does not affect the substantive rights of the parties, but is merely procedural and is therefore controlled by state law. This Court held otherwise, stating:

> (U. S. at p. 245, L. Ed. at pp. 243-244) "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them *by the jurisdiction in which the right itself originates.* Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by state law. (Citing *Erie R. Co. v. Tompkins, supra*). And admiralty courts, when invoked to protect rights rooted in state law endeavor to determine the issues in accordance with the substantive law of the state. *So here, in trying this case the state court was bound to proceed in such manner that all the substantial rights*

of the parties under controlling federal law would be protected." (Emphases supplied.)

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(U. S. at p. 249, L. Ed. at pp. 245-246) "The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure."

Seas Shipping Company v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099, involved an action *at law*, brought by a longshoreman in the United States District Court for the Eastern District of Pennsylvania to recover damages resulting from injuries sustained on board defendant's vessel (moored at a dock in Philadelphia) by reason of a defective shackle supporting a boom. Liability was predicated, in part, upon unseaworthiness. Defendant contended, inter alia, that the doctrine of unseaworthiness is peculiar to the admiralty and cannot be applied in a suit brought on the law side of the court. This Court rejected this contention, holding (U. S. at p. 88, L. Ed. at p. 1103): "*It is now well settled that a right peculiar to the law of admiralty may be enforced either by a suit in admiralty or by one on the law side of the court.*" (citing, inter alia, Garrett v. Moore-McCormack Co., supra).

In *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 66 L. Ed. 927 (decided under the law as it existed prior to the enactment of the Jones Act, 46 USCA Sec. 688) an injured seaman brought an action in a *state court* for damages resulting from an explosion on defendant's vessel. Certiorari was granted to review affirmance of a judgment for plaintiff by the highest appellate court of the state, defendant's contention being that the trial judge had incorrectly instructed the jury in that he had permitted the jury to find compensatory damages, instead of restricting re-

covery to maintenance and cure and wages. The trial judge had instructed the jury according to the common law rule of negligence and contributory negligence and had neglected to charge on unseaworthiness. The Supreme Court held that under the maritime law plaintiff was entitled to compensatory damages, that the general rules of the maritime law apply *whether the proceeding be instituted in an admiralty or common-law court*, and that since the trial court had not instructed the jury in consonance with these rules, it fell into error. However, in view of the fact that the charge was more favorable to the defendant than he was entitled to demand under the law, the Court refused to disturb the judgment.

In *Robins Dry Dock & Repair Co. v. Dahl*, 266 U. S. 449, 69 L. Ed. 372, plaintiff, a dry dock worker, brought an action in a New York *state court* (under the law as it existed prior to the enactment of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901 et seq.) to recover damages for personal injuries against his employer, alleging that he was injured while doing repair work on a vessel in navigable waters, when a plank on which he was standing broke. Liability was predicated upon the negligence of his employer, in that the company failed to furnish a safe place to work, and failed to provide a safe scaffold as required by the Labor Laws of the State of New York. The trial judge had charged the jury, inter alia, that in determining the question of defendant's negligence, they could take into consideration Sec. 18 of the New York Labor Law which defined the duties of employers with respect to scaffolds. Judgment went for the plaintiff, and was affirmed by the State Appellate Court. This Court reversed, holding:

> (U. S. p. 457, L. Ed. p. 374) "The alleged tort was maritime, suffered by one doing repair work on board a completed vessel.
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> " . . . *The rights and liabilities of the parties arose out of and depended upon the general maritime*

law, and could not be enlarged or impaired by the state statute (citing cases). They would not have been different had the accident occurred at San Francisco.

"The jury were distinctly told that they might consider the provisions of the local law in deciding whether or not the employer was negligent. *No such instruction would have been permissible in an admiralty court, and it was no less objectionable when given by the state court.* The error is manifest and material." (Emphases supplied.)

Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 62 L. Ed. 1171 involved a seaman's action for personal injuries, *decided under the general maritime law prior to the advent of the Jones Act, supra* (46 U. S. C. A. Sec. 688). The action was prosecuted at law in the District Court. It was based upon injuries allegedly sustained because of an improvident order of a superior officer, and full indemnity for damages was demanded, no claim being made for maintenance and cure and wages and no attempt being made to base liability on unseaworthiness. The seaman argued for the application of the common law rule of full indemnity while the shipowner contended that the extent of recovery was circumscribed by the maritime rule which (prior to the Jones Act) limited the seaman's right to maintenance and cure and wages, where the injury was sustained through the negligent order of the master or through the negligence of any member of the crew, and not by reason of unseaworthiness. This Court affirmed the judgment in favor of defendant, and, in disposing of the question, quoted with approval from the opinion of the Court of Appeals:

(U. S. pp. 379, 380, L. Ed. pp. 1174, 1175) "The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of *The Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 Sup. Ct. Rep. 483; and although, be-

cause of these peculiarities, such contracts are almost invariably litigated in admiralty courts, still the contract must be the same in every court, maritime or common law. The only difference between proceeding in one court or the other would be that the remedy would be regulated by the lex fori. If a seaman who had been locked up in irons for disobedience of orders were to sue the master for damages in a court of common law, he could not recover like a shore servant, such as a cook or chauffeur, who had received the same treatment. *So a seaman bringing suit in a common-law court for personal injuries could recover, even if guilty of contributory negligence,* although a shore servant suing in the same court could not." (Emphasis supplied.)

The controlling decisions in this field of law are pervaded by the fundamental policy, deeply imbedded in constitutional considerations, that just as state law is supreme in the field of state-created rights, so is federal law (in this instance the maritime law) supreme in the field of federally-created rights, no matter what forum is called upon to adjudicate them.[7]

(B) The Effect of Contributory Negligence Upon Plaintiff's Maritime Rights Is a Matter of Substance Governed Exclusively by the Maritime Law.

As we will fully develop in a later section of our brief, it is incontrovertibly established in the maritime law that an injured worker's contributory negligence does not bar recovery, but merely goes to mitigation of the damages recoverable. Petitioner contends, nevertheless, that when the right is asserted at law, the common law rule must be applied as a bar. Since there is no "federal general common

7. For a recent exhaustive opinion on the subject, see *Jansson v. Swedish American Line*, 185 F. 2d 212 (C. A. 1—1950).

law" (*Erie R. Co. v. Tompkins, supra,* 304 U. S. 64, 78) petitioner contends for the Pennsylvania common law rule, because the tort was consummated within the territorial waters of that state.

Whether or not petitioner's position is sound reduces itself to the question whether the rule for which it contends is one which may be broadly, although not precisely, characterized as one of "substance" or as one of "procedure". To paraphrase the language of this Court in *Guaranty Trust Co. v. York, supra,* 326 U. S. 99 at p. 109, 89 L. Ed. 2079 at p. 2086: The question is not whether the particular rule contended for is declared a matter of "procedure" in some sense; the question is whether such rule concerns merely the manner and the means by which a right to recover, as recognized in admiralty, is enforced, or whether such rule is a matter of substance in the aspect that alone is relevant to the problem, namely, *does it significantly affect the result of this litigation for the federal court, at law, to disregard a rule of the maritime law that would be controlling in an action upon the same claim by the same parties in the admiralty courts?* [8]

That the rule respecting the effect of contributory negligence is one of substance is hardly open to controversy. In *Central Vermont R. Co. v. White,* 238 U. S. 507, 59 L. Ed. 1433, involving a suit in a state court under the Federal Employers' Liability Act, the trial resulted in a verdict

8. The broad scope of this doctrine is illustrated by the recent decision in *Brown v. Western Railway of Alabama,* 338 U. S. 294, 94 L. Ed. 100, involving an action in a state court under the F. E. L. A., wherein this Court held that a railway employee's federally-created rights may not be defeated by a local rule of practice under which pleadings are required to be construed most strongly against the pleader. See also *Dice v. Akron, C. & Y. R. Co.,* — U. S. —, 96 L. Ed. Adv. Op. 285 (Feb. 4, 1952) where this Court held that the right to a jury trial under the Federal Employers' Liability Act, on the issue of fraud in obtaining a release, is a substantive right which may not be abrogated by local state practice.

and judgment for plaintiff. On writ of error in this Court the defendant contended, inter alia, that the trial court had erred in refusing to charge the jury according to the Vermont rule, under which the plaintiff has the burden of affirmatively proving his freedom from contributory fault. This Court rejected this contention, holding that the question of *burden of proof* as to contributory negligence is a matter of substance, governed exclusively by federal law. A fortiori, the *effect* of contributory negligence upon the plaintiff's maritime causes of action is a matter of substance governed by the maritime law, and not subject to the control of the states. Cf. *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, 62 L. Ed. 1167 involving the Mississippi "Prima Facie Act".

Conversely, and consistent with the basic doctrine of dominance of state law in the field of state-created rights, this Court held, in *Palmer v. Hoffman*, 318 U. S. 109, 116, 117, 87 L. Ed. 645, 651, that in a case involving state-created rights, the question of the burden of establishing contributory negligence is one of local law which federal courts in diversity cases *must* apply.

In *Beadle v. Spencer*, 298 U. S. 124, 80 L. Ed. 1082, this Court had before it the question whether in a seaman's action for personal injuries, *brought in a state court*, it was error to refuse to charge that assumption of risk was a defense barring recovery. In answering the question in the negative, the Court said:

> (U. S. pp. 130-131, L. Ed. p. 1085) " . . . the charge in the form requested, so far as applicable to the evidence, and in view of that actually given, amounted to no more than a request to charge that his (the seaman's) negligence was a defense. *Contributory negligence is not a defense to a suit brought either under the Jones Act or under the maritime law for injuries attributable to negligently defective equipment. Under both it is ground only for apportionment of the damages . . .* "

Socony-Vacuum Oil Co. v. Smith, 305 U. S. 424, 83 Ed. 265 involved a *civil action* brought in the district cou for personal injuries sustained by a seaman. The questi for determination, left open in *Beadle v. Spencer, supr* was whether assumption of risk is a complete defense whe the seaman consciously chooses to use an unsafe applian instead of a known safe method of doing his work. T Court again answered the question in the negative, and, arriving at its conclusion, said:

> (U. S. at pp. 431-432, L. Ed. at pp. 270-271) "Any ru of assumption of risk in admiralty, whatever its scop *must be applied in conjunction with the established a miralty doctrine of comparative negligence and in ha mony with it.* Under that doctrine contributory neg gence, however, gross, is not a bar to recovery but on mitigates damages . . .
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> "The common law is consistent in holding th both contributory negligence and assumption of ri are defenses. But other considerations apart, it seer inconsistent, and an impractical refinement, to app the rule for which petitioner contends *in a system law which maintains the comparative negligence rule the fullest extent.*" (Empheses supplied.)

This case is of the utmost significance for it w brought on the *law* side of the district court. Vital to t Court's holding that the rule of assumption of risk mu be applied in harmony with the admiralty doctrine of co parative negligence was the basic premise that this d trine is applicable as well *at law* as in admiralty, i. e., th the "system of law which maintains the comparative neg gence rule to the fullest extent" is equally controlli *whether the action be brought in admiralty or at l* Otherwise no inconsistency could result in the adoption assumption of risk as a complete bar in actions at l brought to enforce maritime rights, and the rationale

which the court rejected the doctrine of assumption of risk could have no possible basis. This case firmly establishes that the admiralty doctrine of comparative negligence must control the result whether the action is brought in admiralty or on the law side of the federal district court.

Tracing the history of this problem through the adjudications in the Second Circuit is exceptionally enlightening, for it points up the difficulties encountered in the uncritical acceptance of the Belden v. Chase doctrine when perpetuated without consideration of the more recent authoritative expressions of this Court.

So far as we have been able to ascertain, the problem, in its more general aspect, first came to the attention of the Second Circuit Court of Appeals in *Chelentis v. Luckenbach S. S. Co.*, 243 F. 536 (1919). That case was an action *at law*, and involved the question whether in such action a seaman injured by reason of a negligent order of his superior officer can recover full indemnity under common law principles, or is restricted to the recovery of maintenance and cure and wages, under the then existing rule of the maritime law. (See *The Osceola*, 189 U. S. 153, 47 L. Ed. 760). The Court held against the application of the common law rule, upon the theory that the seaman's rights must be the same in every court, whether admiralty or common law, and that the only difference between a proceeding in one court or the other relates to procedural aspects. In discussing the seaman's substantive rights, the Court had occasion to observe, albeit by way of dictum, (p. 538) that " . . . a seaman, bringing suit in a common law court for personal injuries, could recover, *even if guilty of contributory negligence*, although a shore servant, suing in the same court, could not," language quoted with approval when the case was affirmed by this Court in 247 U. S. 372, 62 L. Ed. 1171. The dictum of the *Chelentis* case was followed by further dictum in *John A. Roebling's Sons Co. of New York v. Erickson* (C. A. 2—1919), 261 F. 986 (certiorari denied), an action *at law*, wherein the Court pointed out that the sea-

man's contributory negligence, though it does not bar recovery, may be taken into consideration in determining the extent of indemnity which he should receive. *Storgard v. France and Canada S. S. Corp.*, 263 F. 545 and *Cricket S. S. Co. v. Parry*, 263 F. 523 (both decided in 1920) followed. Both involved seamen's claims for personal injuries brought at law before the effective date of the Jones Act. Both applied the rule of comparative negligence by reducing the damages in proportion to the seaman's fault.

The precise question here involved came squarely before the Second Circuit for the first time in *Port of New York Stevedoring Corporation v. Castagna*, 280 F. 618, cert. den., 66 L. Ed. 801 (1922). That case involved an action *at law* by a longshoreman against his employer (under the maritime law as it existed prior to the Jones Act, supra, and the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. 901 et seq.) for personal injuries sustained during the course of his work. From a verdict and judgment for plaintiff, defendant appealed, contending, inter alia, that error was committed in charging the jury that if plaintiff was guilty of contributory negligence, such negligence merely went to a reduction of damages, and in refusing to charge that contributory negligence bars recovery. The Court of Appeals rejected this contention, stating:

> (p. 624) "The right to recover irrespective of contributory negligence is a right, and not a matter of procedure, nor is it governed by the choice of the forum. In the case at bar plaintiff has sought his remedy at common law to obtain redress arising out of a maritime tort. *He entered the common law court with the same right as he would have entered the admiralty court. That was the right to recover, irrespective of his own negligence, provided, of course, he could show the negligence of his employer, and this right of plaintiff sprang into existence because he suffered a maritime tort.*" (Emphasis supplied.)

Thus, the matter stood in the Second Circuit until some six years later (1928). In *Johnson v. United States Shipping Board Emergency Fleet Corporation*, 24 F. (2d) 963 (reversed on other grounds in 280 U. S. 320), involving a longshoreman's action *at law* for personal injuries, the Court, in a quarter-page per curiam opinion and without discussion, rejected its former holding in the *Castagna* case, *supra*, which it now considered as inadvertent dictum, on the authority of *Belden v. Chase, supra, Atlee v. Packet Co., supra*, and *Maleeney v. Standard Shipbuilding Company*, 237 N. Y. 253, 142 N. E. 602. The Court was evidently not aware of the fact that three years earlier (1925) in *Robins Dry Dock and Repair Co. v. Dahl, supra*, 266 U. S. 449, discussed earlier in this brief, this Court had before it the precise problem involved in the *Maleeney* case (i. e., whether the New York Labor Law imposing duties upon employers with respect to scaffolds can be considered by a jury trying a longshoreman's maritime cause of action) and had not only come to a diametrically opposite conclusion, but had consciously rejected the *Maleeney* case, for that case had been cited in the brief filed by the defendant in error in *Robins Dry Dock v. Dahl* (See 69 L. Ed. at p. 373).

Again in 1931, this problem was presented to the Court of Appeals for the Second Circuit, but this time in a somewhat different form, in *In Re Pennsylvania R. Co.*, 48 F. (2d) 559. This case is of considerable interest because it not only discloses the Court's rationale behind its earlier per curiam decision in *Johnson v. Shipping Board, supra*, but also demonstrates that the Court was holding firm to the position there taken with mixed feelings. The question raised and decided was whether the admiralty court, which had obtained jurisdiction over a non-maritime tort only by virtue of limitation of liability proceedings, was bound by the common law rule of contributory negligence, or was free to follow the maritime rule. The Court recognized the rule as well settled that where the wrong occurs in one jurisdic-

tion and action is brought in another, the rule of contributory negligence of the first governs; and that the law of the place where the tort occurs controls the extent of recovery. Nevertheless, on the authority of *Belden v. Chase, supra,* and *Atlee v. Packet Co., supra* (as well as upon the authority of the overruled case of *Maleeny v. Standard Building Corp.,* and its own decision in *Johnson v. U. S. Shipping Board Emergency Fleet Corp.,* both discussed above) the Court felt it was unable to escape the conclusion that *"as between a common-law court and a court of admiralty the question is treated as one of procedure, though in general the law is otherwise"* (48 F. 2d at 566). Consequently, although expressly acknowledging the anomaly, the Court held the maritime rule to be controlling.

At this junction in the consideration of the problem, the Second Circuit was not yet cognizant of the fact that precisely because it was dealing with a state-created right, the application of the maritime rule was necessarily foreclosed. *Western Fuel Co. v. Garcia,* 257 U. S. 233, 66 L. Ed. 210. Persuasive to the Court's thinking was the belief that "there is nothing in the books beyond our own overruled dicta which throws doubt upon Belden v. Chase." (48 F. 2d at 566.) But whatever the status of the law may have been in 1931, the date of that decision, there is now much on the books not merely to throw doubt upon *Belden v. Chase,* but to completely destroy its dictum as well as the cases which had relied upon it. The Court of Appeals for the Second Circuit could not have foreseen, for example, that in *Garrett v. Moore-McCormack Co., supra,* 317 U. S. 239 (1942), the shipowner was to rely heavily upon the *Belden v. Chase* dictum for the proposition that the Pennsylvania rule, rather than the maritime rule, as to burden of proof for setting aside a seaman's release, was controlling and that this Court in rejecting this contention clearly disclosed its conviction that *Belden v. Chase* had completely lost its vitality in the light of the intervening fifty years of judicial history, by declaring in an unanimous opinion

"This Court has (in many cases) declared the necessary dominance of admiralty principles in actions in vindication of rights arising from admiralty law. *Belden v. Chase*, 150 U. S. 674, 37 L. Ed. 1218, 14 S. Ct. 269, an 1893 decision which respondent relies upon as establishing a contrary rule,—*has never been thus considered in any of the later cases cited*" (317 U. S. at p. 245). Nor could the Court have been expected to foresee that in the very same case this Court, in discussing the obligation imposed upon law courts to enforce substantive rights arising from admiralty law in conformity with admiralty principles, had referred to a number of decisions exemplifying the rule (See 317 U. S. 239, 244, footnotes 8 and 9) among which is to be found *Port of New York Stevedoring Corp. v. Castagna, supra*, 280 F. 618, the earlier Second Circuit decision which had *affirmed* the principle of the dominance of the maritime law over state law in the field of contributory negligence involving a longshoreman, and had bypassed the later Second Circuit decisions to the contrary in *Johnson v. U. S. Shipping Board Emergency Fleet Corp., supra* and *In Re Pennsylvania R. Co., supra.*

Not until its decision in *Cannella v. Lykes Bros. S. S. Co.*, 174 F. 2d 794 (C. A. 2), where the Court, in a *civil action*, rejected the contention that under this Court's ruling in *Caldarola v. Eckert*, 332 U. S. 155, 91 L. Ed. 1968, the local law rather than the maritime doctrine of seaworthiness measured the shipowner's responsibility toward its longshore workers, did the Second Circuit begin to assimilate its thinking to the trend of authoritative decision. Its position was finally consolidated in *W. E. Hedger Transp. Corp. v. United Fruit Co.*, 198 F. 2d 376 (decided after argument but before decision had been reached in the case at bar below) where, in a civil action on a maritime claim for the negligent sinking of plaintiff's barge, the Court unequivocally repudiated its earlier decisions to the contrary, and held that the plaintiff's contributory negligence did not bar recovery according to the course of the common law,

but merely served to mitigate the damage in accordance with the admiralty rule. In doing so, the Court specifically recognized that the doctrine of *Belden v. Chase* had lost its vitality in the light of this Court's decisions in *Garrett v. Moore-McCormack Co., supra, Seas Shipping Co. v. Sieracki, supra,* and *Carlisle Packing Co. v. Sandanger, supra.*[9]

It is submitted that decisions such as those until recently prevailing in the Second Circuit are erroneous. They were fostered by "a particular way of looking at the law which dominated the judicial process long after its inadequacies had been laid bare."[10] The cases from which they attempt to draw their strength have lost their vitality in the intervening sixty years of judicial history. It is not difficult to understand that in 1892 (the date of the decision in *Belden v. Chase, supra*), when the *Swift v. Tyson* doctrine was still in vogue in diversity cases involving state-created rights, this Court should take a consistent view with respect to federally created rights litigated in the state courts. When *Belden v. Chase* was decided, this Court had not yet crystallized nor clarified for itself the full import of the theory of dominance of the maritime law over state law. It was decided in a judicial climate unfamiliar with

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9. Petitioner lays much stress upon the contention (page 43 of its brief) that the Court, in the *Hedger* case, applied the admiralty rule only because the New York Courts would have done so had the litigation been adjudicated in the state courts. This is an erroneous view. The Court specifically applied the maritime rule without regard for state law, merely pointing out, in passing, that the result would be the same even if *Erie R. Co. v. Tompkins, supra,* were thought to be applicable, since New York would look to the admiralty rule to determine the effect of contributory negligence.

10. *Guaranty Trust Co. of New York v. York, supra* (326 U. S. at 101).

For a discussion of the Second Circuit cases see Robinson, Admiralty pp. 859-862.

Benedict on Admiralty, 6th Ed. Vol. 1, pp. 53-55.

the modern concepts of "substance" and "procedure", and long before the doctrine of federally-created rights versus state-created rights had been formulated in its modern aspects. Just as surely and inexorably as the *Swift v. Tyson* doctrine was to be overruled in *Erie R. Co. v. Tompkins, supra,* so too was the doctrine of *Belden v. Chase* to be completely repudiated,[11] for it is inconceivable that a judicial philosophy which recognizes the necessary dominance of state law in the field of state-created rights should fail, ultimately, to accord to the maritime law a corresponding supremacy.

(C) Caldarola v. Eckert, 332 U. S. 155.

Petitioner contends that the doctrine of supremacy of the maritime law is no longer valid when considering the rights of longshore workers; that *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 61 L. Ed. 1086, which invalidated, on the ground of the supremacy and necessary uniformity of the maritime law, the application of the New York Workmen's Compensation Act to a stevedore killed while unloading a vessel upon navigable waters within the territorial jurisdiction of that state, has been gradually watered down by succeeding decisions of this Court; and implies finally, that in *Caldarola v. Eckert, supra,* 332 U. S. 155, 91 L. Ed. 1968, this Court rejected the *Jensen* doctrine altogether. This chain of reasoning involves, first, a basic misconception of the *Jensen* doctrine; second, a complete misunderstanding of the *Caldarola* decision; and finally, a conclusion which does not follow even if petitioner's premises are thought to be valid.

In *Southern Pacific Co. v. Jensen, supra,* the question raised was the state's power to enforce a state-created right for a maritime tort, that is, the right to workmen's compensation under the New York law. The question was

11. Commentators have taken the same view: Robinson, Admiralty, p. 860; 6 N. Y. U. L. R. 15, 30; 64 Harv. L. Rev. 246, 255.

posed in the context of then existing law under which, in the light of the Constitutional grant to the United States of judicial power over "all cases of admiralty and maritime jurisdiction" (Article 3, Sec. 2 of the Constitution), and of Section 9 of the Judiciary Act of 1789 (1 Stat. at L. 76, 77, Chap. 20), by which the district courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction—saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it", this Court had found it difficult to define with exactness how far the general maritime law may be changed, modified or affected by state legislation. (*Southern Pacific Co. v. Jensen, supra,* U. S. pp. 214-216). Recognizing that this may be done to some extent (state statutory lien for repairs to a vessel in her home port: *The Lottawanna,* 21 Wall. 558, 22 L. Ed. 654; pilotage fees: *Cooley v. Port Wardens,* 12 How. 299, 13 L. Ed. 996; state wrongful death statutes: *American Steamboat Co, v. Chace, supra,* 16 Wall. 531, 21 L. Ed. 371) but equally recognizing limitations on the state's power beyond which it may not go, this Court declared invalid and unconstitutional any exercise of the state's power in the maritime field "if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations" (U. S. p. 216). Whether rightly or wrongly, this Court decided that the New York Act did in fact work material prejudice to the maritime law, and interfered with its proper harmony and uniformity. That the decision might well have gone the other way in the light of its earlier decisions in *American Steamboat Co. v. Chace, supra,* 16 Wall. 522 (according to state courts the freedom to enforce a state-created right of action for wrongful death occurring upon navigable waters, in the absence of Congressional action) and *Old Dominion Steamship Co. v. Gilmore, supra,* 207 U. S. 398 (which ac-

corded to admiralty courts the right to respect and enforce such state-created rights) is not here of major significance. What is important to an understanding of the problem at hand is to recognize that the doctrine concerned itself primarily with establishing the boundary beyond which *state power* in the maritime field could not be validly exercised. The question raised was the validity of the power attempted to be exercised *by the courts of New York* over maritime matters via the State Workmen's Compensation Law. *Implicit in the question was the absence of any recognized right accorded by the admiralty to the deceased longshore worker.* The dissenting opinions point up the question. Mr. Justice Pitney, dissenting, considered the question to be a "narrow one" (U. S. p. 239) "Do the Constitution and laws of the United States prevent *a state court of common law* from applying the state statute in an action in personam arising upon navigable waters within the state, there being no Act of Congress applicable to the controversy?" and further, that "the point involves the question of *state power.*" (Emphases supplied.) Clearly in this view no question presenting any supposed controlling effect of state common law *on federal courts administering maritime rights* was involved. Mr. Justice Holmes' dissent (U. S. 218 et seq.) which may be summarized as follows, throws further light upon the narrow question at issue: First: the problem is one involving the *supplementation*, not the *derogation*, of the maritime law; where there is *no inconsistent maritime law*, the states have the power to pass statutes creating rights and imposing liabilities. Second: the question is what are the *state courts* free to do, not whether state law must be accepted by federal courts enforcing maritime rights; and the mere silence of Congress, *absent an inconsistent maritime rule*, does not foreclose the *state courts* from applying the common law or enforcing state statutory law. Third: As to the "specter of lack of uniformity", Mr. Justice Holmes contented himself with referring to *Old Dominion S. S. Co. v. Gilmore, supra.*

Thus it is that the supremacy of *existing maritime rights* over conflicting state law was not the question in the *Jensen* case. This Court, in *Garrett v. Moore-McCormack Co., supra,* reaffirming in an unanimous decision the necessary dominance of admiralty principles in the adjudication of rights arising from admiralty law, has emphasized that disagreement over the constitutional issues of the cases in the *Jensen* line has never extended to this principle (317 U. S. at 245, footnote 10). A fortiori, no aspect of the *Jensen* controversy involves the imposition of state law *upon federal courts administering maritime claims* by permitting the common law contributory negligence rule to override the established admiralty right of apportionment of damages.

Rejection of the *Jensen* doctrine, therefore, merely enlarges the area in which that doctrine has confined the exercise of *state power* in the maritime field; it does not and cannot establish the supremacy of state law over existing maritime law, and certainly does not permit local law to control the federal diversity court in the administration of recognized maritime rights. Neither the *Jensen* line of cases nor this Court's recent decision in *Caldarola v. Eckert, supra,* establish any such proposition. It is only where the right attempted to be enforced is *exclusively of state origin,* that this Court has established the supremacy of state law when administered in federal diversity courts: *Holmberg v. Armbrecht,* 327 U. S. 392, 90 L. Ed. 743.[12]

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12. The question there posed was whether a state statute of limitations would bar the enforcement, in a federal suit in equity, of the statutory liability of a stockholder in a Federal land bank. In holding against the application of the local law and in defining the impact of the *Erie R. Co. v. Tompkins* doctrine upon federal courts, this Court unequivocally restricted its operation to *rights derived solely from a state* and, through Mr. Justice Frankfurter, said:

(327 U.S. 394) "In *Guaranty Trust Co. v. York,* supra, (326 U. S. 99), we ruled that when a state statute bars recovery of a suit in a State court on a State-created

Petitioner's position is tenable only if state power, exercised in the maritime field, is not merely valid but supreme over existing maritime law, for then only can state law compel federal courts exercising jurisdiction over mari-

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right, it likewise bars recovery of such a suit on the equity side of a federal court brought there merely because it was 'between citizens of different states' under Art. 3, Sec. 2 of the Constitution . . . We held . . . that a statute of limitations is a significant part of the legal rules which determine the outcome of a litigation. As such, it is as significant in enforcing a State-created right by an exclusively equitable remedy as it is in an action at law. But in the York case we pointed out with almost wearisome reiteration that we were there concerned solely with State-created rights . . . The considerations that urge adjudication by the same law in all courts within a State when enforcing a right created by that State are hardly relevant for determining the rules which bar enforcement of an equitable right created not by a State legislature but by Congress.

. . . . . .

(p. 395) "The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity . . . And so we have the reverse of the situation in Guaranty Trust Co. v. York, supra. *We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State.*" (Emphasis supplied.)

Compare *The Harrisburg, supra,* 119 U. S. 199, 30 L. Ed. 358 and *Western Fuel Co. v. Garcia,* 257 U. S. 233, 66 L. Ed. 210, where this Court held that if courts of admiralty adopt a state wrongful death statute as a rule of right, they must take the right subject to the limitations which have been made a part of its existence. This is consistent with the converse rule, namely, that where a state undertakes to adjudicate a right exclusively of maritime origin, it must do so in conformity with the maritime law: *Garrett v. Moore McCormack Co., supra,* 317 U. S. 239, 249.

time affairs to grant or withhold relief. And while the area in which state power was left free to operate in matters maritime was expanded at the hands of this Court in subsequent decisions, and while it is true that this Court has stated by way of dictum that the *Jensen* case has no vitality beyond its application to state workmen's compensation laws: *Standard Dredging Corp. v. Murphy*, 319 U. S. 306, 309, 87 L. Ed. 1416, 1419-1420,[13] reconsideration of the constitutional implications of the *Jensen* case has never been undertaken. This Court expressly declined to do so in *Davis v. Department of Labor*, 317 U. S. 249, 87 L. Ed. 246 (1942).[14] It is in this context that the decision in *Caldarola v. Eckert, supra*, must be considered.

In *Caldarola* a longshoreman was injured in the course of his employment on board the S. S. "Everagra", then docked in the North River, New York City. The vessel was owned by the United States and managed on its behalf by the defendant as General Agent.[15] Action was brought in the New York state courts. The highest tribunal of that state held that under New York law the relation which the Agents bore to the vessel did not make them responsible to a third person for its condition and dismissed the com-

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13. That this dictum is not entirely accurate, see *Robbins Dry Dock & Repair Co. v. Dahl, supra*, 266 U. S. 449, in which the *Jensen* doctrine was applied to the New York Labor Laws relating to safe scaffolds on board ship. This case has never been questioned or overruled.

14. It was on the very day the *Davis* case was decided that this court laid emphasis on the fact that disagreement over the constitutional issues in the Jensen line of cases has not extended to the necessary dominance of admiralty principles in the adjudication of rights arising from admiralty law. *Garrett v. Moore-McCormack Co., supra* (317 U. S. at 245, footnote 10).

15. The questions involved in the interpretation of the General Agent Service Agreement between the United States and the defendant are not pertinent here and will not be discussed.

plaint. On certiorari this Court was faced with the problem whether, in view of the admitted maritime nature of the tort, the action of the New York Court, based upon New York law, was decisive. In a five to four decision this Court held that it was. The majority, through Mr. Justice Frankfurter, held the view that the authorities are not clear on the question whether Congress, in enacting the "saving to suitors" clause (Section 9 of the Judiciary Act of 1789) recognized that there were common law rights in the states also cognizable in admiralty, or whether it was concerned only with "saving" to the states the power to use their courts, via common law remedies, to vindicate rights derived from the maritime law; but that

> (332 U. S. at 158) "In any event, whether New York is the source of the right or merely affords the means of enforcing it, her determination is decisive that there is no remedy *in its courts* for such a business invitee against one who has no control and possession of premises. Compare Douglas v. New York, N. H. & H. R. Co., 279 U. S. 377, 73 L. Ed. 747, 49 S. Ct. 355, and Testa v. Katt, 330 U. S. 386, ante 967, 67 S. Ct. 810, 172 ALR 225." (Emphasis supplied.)

The quoted language is critical to an understanding of this case: the three words emphasized and the two cases cited by the Court provide, for us, the key to the meaning of the decision. They disclose that the case turned upon considerations completely divorced from the principle of supremacy of the maritime law over state law, and unrelated to any aspect of the *Jensen* doctrine. In the first case, *Douglas v. New York, etc. R. Co.*, 279 U. S. 377, a suit under the Federal Employers' Liability Act was dismissed by a New York State Court under a state statute giving the Court the discretion to decline to entertain such an action in cases involving nonresidents. This Court affirmed, holding that neither the "equal privileges and immunities" clause of the Constitution (Article 4, Section 2) nor the

grant of concurrent jurisdiction to the federal and state courts, embodied in the F. E. L. A., requires a contrary result. As to the first, the Court held that since the New York statute did not discriminate in favor of citizens against noncitizens, Constitutional requirements were satisfied; as to the second, the Court held that in granting concurrent jurisdiction to the courts of the States, the F. E. L. A. did not purport to *require* such courts to entertain suits arising thereunder, or to *force a duty upon such courts, as against an otherwise valid excuse.* In *Testa v. Katt*, 330 U. S. 386, the second case referred to in *Caldarola*, Rhode Island's excuse for refusing to entertain an action for treble damages under the Emergency Price Control Act was held to be invalid, for reasons not here pertinent, and the Rhode Island Court was therefore held to be bound to enforce the federal claim.[16]

It is evident, therefore, that *Caldarola* did not turn on questions of state law versus maritime law at all, but rather on the narrow question of the state's duty to entertain and enforce in its courts a federal claim. In holding as decisive New York's determination "that there is no remedy *in its courts*" for the claim asserted by Caldarola, the Court simply decided that no such duty existed under the circumstances there disclosed. It was in this context that the Court considered it immaterial whether the claimed right was possibly of dual, i. e., both maritime and local, origin.[17]

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16. For recent decisions involving the State's power to deny a litigant access to its courts see *First Nat. Bank v. United Air Lines*, — U. S. — , 96 L. Ed. Adv. Op. 360, and *Hughes v. Fetter*, 341 U. S. 609, 95 L. Ed. 1212. See also, Annotation, 95 L. Ed. 1221.

17. An examination of the New York decision affirmed in *Douglas v. New York etc. R. Co.*, *supra* (reported in 223 App. Div. 782, 227 N. Y. S. 797, aff'd. 248 N. Y. 580) discloses that the trial court had dismissed the action upon defendant's motion to set aside service of the summons and complaint. In effect at that time, though not referred

That the *Jensen* doctrine was not involved is clear. Nor is it to be supposed, should any doubt remain, that this doctrine, which had been the center of the most heated contro-

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to by the New York Courts, was Section 482 of the Civil Practice Act (enacted in 1920) which provides as follows:

> "A final judgment dismissing the complaint before the close of the plaintiff's evidence does not prevent a new action, ***unless it expressly declares that it is rendered upon the merits.*** A dismissal of a complaint or counterclaim at the close of the plaintiff's or defendant's evidence, as the case may be, or a dismissal of a complaint or counterclaim at the close of the whole evidence, is a final determination of the merits of the cause of action between the same parties or their privies for the same cause of action unless the Court shall dismiss without prejudice."

Since the judgment of dismissal was made on a pretrial motion, without any evidence having been introduced, and did not expressly declare that it was rendered upon the merits, its effect, under the first sentence of Section 482, was a dismissal without prejudice, and consequently the judgment of the Court was clearly tantamount to a refusal to entertain the action.

In *Caldarola,* however, the defendants had appealed from a judgment entered on a verdict in favor of plaintiff. The Appellate Division, First Department, reversed, the action of the Court being "judgment reversed with costs to the appellants and the complaint dismissed with costs" (270 App. Div. 563, aff'd 295 N. Y. 463). This being a dismissal at the close of the whole evidence without indicating dismissal "without prejudice", it would appear that under the second sentence of Section 482 the judgment was a final determination of the merits of the cause of action.

Whether this Court, in its disposition of the *Caldarola* case, may have believed that the effect of the judgments in the *Caldarola* and *Douglas* cases, respectively, was, under New York law, the same, or whether it considered the two cases identical in principle though not the same in precise effect, we are of course in no position to determine. What does appear to be inescapable is that *Caldarola* considered itself bound by the same principle which disposed of *Douglas v. New York etc. R. Co., supra,* that is, the right of a state to decline to entertain a federal claim.

versy for some thirty years, and whose constitutional implications this Court has expressly refused to reconsider,[18] should be suddenly swept away, without a single passing reference to it or to the decision which brought it into being.

But much more important than the absence of connection between *Jensen* and *Caldarola* is the crucial fact that a determination of the non-existence of a duty, *on the part of a state court*, to entertain and enforce a maritime claim can under no view be converted into a requirement that a *federal court, called upon to enforce the same claim, must likewise refuse to entertain it. Caldarola* did not so hold, and therefore cannot be relied upon by petitioner in support of the view that the Pennsylvania rule of contributory negligence must control the disposition of the case at bar.

The recent decision of this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U. S. 282, 96 L. Ed. 318, conclusively demonstrates that *even in the absence of a recognized rule in admiralty*, a federal diversity Court exercising jurisdiction in maritime affairs is not bound by state law. There, as here, the action was instituted by a longshoreman against a shipowner as a civil action in the United States District Court claiming damages for injuries sustained while engaged in repairing certain grain fittings on defendant's vessel, then docked at Philadelphia. There, as here, the shipowner filed a third-party complaint against Haenn Ship Ceiling and Refitting Corporation, plaintiff's employer, claiming contribution because of the concurring negligence of the employer. By agreement of all parties before trial, a judgment was rendered for the longshoreman and paid by Halcyon, the shipowner. The case then proceeded to trial on the question of contribution as between Halcyon and Haenn and the jury returned a special verdict finding Haenn 75% and

18. Mr. Justice Frankfurter, the writer of the *Caldarola* Opinion, had fully concurred in this Court's earlier refusal: *Davis v. Department of Labor, supra*, 317 U. S. 249, 258-259.

Halcyon 25% responsible. Although that case was tried *on the civil side of the court and not in admiralty*, the question which this Court posed for itself was the existence and extent of the *admiralty doctrine* of contribution in non-collision cases. Concluding that no such doctrine is recognized in the admiralty, and considering itself free, as a Court "exercising jurisdiction in maritime affairs", to fashion new judicial rules of contribution "if wholly convinced that it would best serve the ends of justice" (U. S. p. 285), this Court nevertheless declined to do so, believing the problem to be more appropriate for Congressional action under the unique circumstances there involved. *In doing so, this Court did not look to the Pennsylvania law to determine what result would hav been reached if the action had been brought in the Pennsylvania Courts, much less did it consider the federal diversity court in any sense bound by the Pennsylvania rule.*[19] We cannot believe that this Court would have overlooked the force of the decision in *Caldarola v. Eckert, supra,* if the rule in that case had required, as petitioner now contends, that a diversity court exercising jurisdiction in maritime affairs is bound to sacrifice the maritime rule in the face of conflicting state law.[20]

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19. For the Pennsylvania rule see Pa. Act of 1939, June 24, P. L. 1075 Sec. 1, 12 Purdon's Pa. Stat. Ann. Sec. 2081; *Maio v. Fahs,* 339 Pa. 180, 14 A. 2d 105. The rule was considered by this Court, in connection with an action under the Federal Tort Claims Act, in *United States v. Yellow Cab Co.,* 340 U. S. 543, 95 L. Ed. 523.

20. A similar conclusion was reached by this Court in *Seas Shipping Co. v. Sieracki, supra,* 388 U. S. 85, which upheld the application of the *admiralty doctrine of seaworthiness* in a longshoreman's action for personal injuries sustained within the territorial waters of Pennsylvania, *brought on the law side of the federal district court* sitting in Pennsylvania. In doing so, this *Court did not look to see whether Pennsylvania law would permit such result had the action been brought in the Pennsylvania courts.* The dissent, by three of the Justices, was not on the point under consideration.

The harsh and archaic common law doctrine of contributory negligence runs counter to every concept of enlightened standards of justice. It has been abolished in some fields by Congressional action and has been repudiated by numerous states.[21] It is utterly repugnant to the equitable doctrine of comparative fault traditionally applied in the admiralty. That Pennsylvania may still adhere to this outmoded concept of justice cannot furnish the occasion for imposing it upon a federal court enforcing a maritime claim. Nothing short of unavoidable necessity should serve as a sufficient reason for adopting it here.

(D) Under the Maritime Law, the Effect of Hawn's Contributory Negligence, Upon the Extent of Damages Recoverable, Is Determined by the Comparative Negligence Rule.

In *The Arizona v. Anelich, supra,* 298 U. S. 110, 80 L. Ed. 1075 (1936), this Court had before it the question whether assumption of risk is a defense to an action brought under the maritime law as modified by the Jones Act (U. S. C. Title 46, Sec. 688) to recover damages for the death of a seaman caused by defective equipment. Since the Jones Act incorporates into the maritime law the Federal Employers' Liability Act (45 U. S. C. Sec. 51 et seq.), the problem was set against the numerous decisions of this Court holding that in suits brought by railroad employees under the F. E. L. A. assumption of risk *is* a defense when the injuries are caused by defective appliances not required by the Federal Safety Appliance Act (See U. S. at p. 119). In resolving this problem against the availability of the defense, this Court held that the new rules of liability brought into the maritime law by the Jones Act derive their strength "altogether from their inclusion in the maritime law" (U. S. p. 119), that since the Jones Act does not,

21. See Mole and Wilson, A Study of comparative Negligence, 17 Cornell Law Quarterly, 333, 608 et seq.

by its own terms, or by those adopted by reference from the F. E. L. A. prescribe that assumption of risk shall be a defense, the scope of the new rules and the nature of the defenses must be ascertained by reference to their new setting in the admiralty system and "are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part" (U. S. p. 123); and that inasmuch as *before the Jones Act contributory negligence was ground for mitigation of damages only,* and no American case appears to have recognized assumption of risk as a defense, the purpose and terms of the Jones Act and *"the nature of the juristic field in which it is to be applied"* (U. S. p. 123) preclude the assumption that Congress intended, by its adoption, to modify the maritime rules by implication.

In *Beadle v. Spencer, supra,* 298 U. S. 124, 80 L. Ed. 1082, decided on the same day, the same approach was adopted in determining whether assumption of risk was available as a defense where the seaman's claim is predicated upon the negligent failure to provide him with a safe place to work. The trial court had refused defendant's requests to charge that assumption of risk is a defense to the action. This Court held that the form of the requested charge was tantamount to a request that the seaman's negligence was a bar to recovery, and that the refusal to so charge was not error, since "Contributory negligence is not a defense to a suit brought either under the Jones Act or *under the maritime law for injuries attributable to negligently defective equipment.*[22] *Under both it is ground only for apportionment of the damages . . .*" (U. S. p. 131).

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22. Since the general maritime law did not permit recovery of indemnity for the negligence of a fellow-servant (*The Osceola,* 189 U. S. 158, 175, 47 L. Ed. 760, 764) the qualifying phrase "injuries attributable to negligently defective equipment" was appropriate and necessary in the context used.

Finally, three years later, in *Socony-Vacuum Oil Co. v. Smith, supra* (1939), 305 U. S. 424, 83 L. Ed. 265, this Court was called upon to determine the question, left open in *Beadle v. Spencer, supra,* and *The Arizona v. Anelich, supra,* whether assumption of risk is a defense where the seaman consciously chooses an unsafe appliance instead of a known safe method of doing the work. This Court again answered the question in the negative, and in arriving at its conclusion said in pertinent part:

> (U. S. pp. 428-429) "Before the Jones Act a seaman was entitled to recover from a vessel or its owners indemnity for injuries due to an unseaworthy vessel or for 'failure to supply and to keep in order the proper appliances appurtenant to the ship.' . . . Contributory negligence, *then as now,* was not a defense in suits brought by seamen to recover for injuries attributable to defective equipment, *but was ground only for mitigation of damages.* See The Max Morris, 137 U. S. 1; The Arizona v. Anelich, supra. (298 U. S. 122) and cases cited.
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> (U. S. p. 431) "Any rule of assumption of risk in admiralty, whatever its scope, *must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it.* Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages.
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> (U. S. p. 432) . . . "In either case (that is, whether or not the seaman has a choice of using a safe appliance) the seaman's negligence is a contributing cause of his injury, without which the shipowner would be liable to the full extent of the damage.
>
> "The incongruity and practical embarrassment in the application of a rule that the negligence in the one case bars recovery, while that in the other only reduces

> the recoverable damages, are evident. The common law is consistent in holding that both contributory negligence and assumption of risk are defenses. But other considerations apart, it seems an inconsistent, and an impractical refinement, to apply the rule for which petitioner contends *in a system of law which maintains the comparative negligence rule to the fullest extent.*" (Emphases and parenthetical matter supplied.)

In all of these cases a careful evaluation of the "nature of the juristic field in which the (Jones Act) is to be applied" was the prime consideration in the proper integration of that Act into the maritime law, for the Court considered it vital to interpret the Act in harmony with the established rules of the maritime law. Of controlling importance to this Court, as one of the characteristic attributes of that system, "maintained to the fullest extent", was the admiralty rule of comparative negligence. It is evident, therefore, that this determination was no mere passing remark, as petitioner contends (Petitioner's brief p. 21); it was part of the flesh and blood of these decisions.

Nor did this Court misread the cases upon which it relied, as petitioner contends. Petitioner's case-by-case analysis of these decisions, which exemplified for this Court the evolution of the maritime rule, is a fruitless pursuit, for it discloses nothing more than what is characteristic of the judicial process as a whole, namely, that a doctrine or principle is seldom formulated in its ultimate expression when first propounded, that not infrequently it requires decades of judicial experience, marked by inconsistent and asymmetrical development, before a definitive principle emerges in its ultimate form. We believe it is the high office of this Court, and one of its major tasks under its certiorari jurisdiction, to resolve, to consolidate, and to crystallize divergent and uncertain expressions of principle in the lower federal courts. It is part and parcel of the policy-making powers of this Court. It is this duty

which the Court discharged in *Socony-Vacuum Oil Co. v. Smith, supra,* and its two predecessors, when it synthesized and expressed in its present form the maritime rule of comparative negligence. That rule, *now as before the Jones Act* (*Socony-Vacuum Oil Co. v. Smith, supra,* at U. S. p. 428) furnishes ground for mitigation of damages only, in proportion to the fault of the injured maritime worker. It is an assumption hardly to be indulged that this Court was any less aware of the obvious than is the petitioner here, namely, that the cases which it cited did *not* express the rule in invariant terms. Some fifty years earlier, in *The Max Morris,* 137 U. S. 1, 34 L. Ed. 586 (1890), this Court had before it for the first time the question whether in a longshoreman's suit for damages in admiralty, brought against a shipowner (not his employer) for personal injuries sustained through the negligence of those in charge of the vessel, the libellant's contributory negligence bars recovery. This Court squarely held that it does not, but because of the limited question certified, expressly declined to determine the extent to which contributory negligence would mitigate the damages. It was this question, left open in the *Max Morris,* which was finally resolved in the three cases culminating in *Socony-Vacuum Oil Co. v. Smith, supra.*[23] Since then the comparative negligence rule has consistently been applied by the courts in non-Jones Act personal injury cases: *Guerrini v. United States,* 167 F. 2nd 352; *Badalamenti v. United States,* 67 F. Supp. 575 (modified on other grounds in 160 F. 2nd 422); *Palardy v. United States,* 102 F. Supp. 534 (per Circuit Judge Kalodner); *Kreste v. United States,* 158 F. 2nd 575; *Stokes v. United States,* 144 F. 2nd 82.

Petitioner contends, however, that the comparative negligence rule is by its very concept and definition a rule which necessarily encompasses a comprehensive scheme of

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23. *The Max Morris* was one of the cases considered in *Socony v. Smith* (305 U. S. at 429).

loss distribution among all parties at fault, each being required to bear the burden of loss in accordance with his degree of culpability; that since, under the recent decision of this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, supra,* 342 U. S. 282, there is no right of contribution in admiralty between joint tort feasors in non-collision cases, the comparative negligence rule cannot apply when, as in the case at bar, Pope & Talbot, the original defendant, is foreclosed from seeking contribution from Haenn Ship Ceiling and Refitting Corp., the third party defendant; and that consequently, the application of the comparative negligence rule as between Hawn and Pope & Talbot, only, is not the application of any recognized maritime rule, but rather the formulation of a new rule unknown to the maritime law, a procedure which is foreclosed by the decision in the *Halcyon* case, *supra.* In this situation, petitioner contends, this Court is relegated to the application of the common law rule of contributory negligence under which Hawn is completely barred from recovery.

We will presently reach the numerous basic fallacies which mark the road by which petitioner seeks to arrive at the result which it hopes to achieve. Underlying them all, however, is the unwarranted fundamental assumption that the comparative negligence rule envisions a comprehensive loss-distribution scheme and that therefore, unless all parties at fault are saddled with a share of the loss, its application is anomalous. There is a total and complete absence of any intimation anywhere, whether in the literature or in the decided cases, which would lend the slightest support whatever to the suggestion, here made for the first time, that the rule of apportionment fashioned by the admiralty courts is, either in its conception or in its evolution, in any sense and to any degree whatever integrated into the rights of contribution which may or may not exist as between joint tort feasors. The contention that under the maritime law the problem of allocation of loss as between plaintiff-employee (Hawn) and defendant-shipowner (Pope & Tal-

bot) is inextricably bound to the problem of allocation as between shipowner and the third party defendant (Haenn) is unprecedented, and finds its first and only expression anywhere, so far as we have been able to ascertain, in the argument petitioner now makes before this Court.[24] It is completely devoid of historical roots. Finding no trace of authority, in the maritime law in support of its position, petitioner goes so far as to advance the contention that the statutory comparative negligence rule formulated by the Federal Employers' Liability Act, 35 Stat. 66, 45 U. S. C. Sec. 53, is in full accord with its view (Petitioner's Brief pp. 22-23). Section 53 provides that in actions brought thereunder against any common carrier by railroad:

> ". . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury *in proportion to the amount of negligence attributable to such employee* . . ." (Emphasis supplied.)

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24. In this very litigation the petitioner's position in the Courts below exhibited no traces of this novel doctrine. Defendant-Petitioner's Points for Charge Nos. 9, 10 and 11 (R. 177a-178a) call for the equal division of damages in the event of Hawn's contributory negligence, with no reference to possible concurrent fault on the part of Haenn. Petitioner's post-trial motion for molding the verdict seeks the entry of judgment for one-half the damages specially found by the jury (Paragraph 5 of Motion—186a). So, too, in the Court of Appeals where, as the opinion of that Court clearly discloses (R. 241) petitioner contended for a 50 per cent reduction of the damages. And in the Petition for Rehearing filed in the Court below, petitioner again expressly contended for the equal division rule (R. 262-263). In point of fact, diametrically opposed to its present contention that *even in admiralty* the present case would call for the common law contributory negligence rule, petitioner contended that *"Contributory negligence would not have barred the plaintiff's recovery, had he invoked the Court's admiralty jurisdiction."* (Petition for Rehearing—R. 261.)

The language of the section is so clear and unequivocal that further comment would hardly be necessary were it not for the fact that in attempting to support its view petitioner seizes upon and takes completely out of context (Petitioner's Brief p. 23) a passage appearing in *Norfolk & Western Ry. v. Earnest*, 229 U. S. 114, 122, 57 L. Ed. 1096, 1101, wherein the Court stated the statutory rule in converse terms, that is to say, that the plaintiff recovers to the extent that the *carrier's* negligence contributed to the loss. The Court there was not dealing with a three party situation. Obviously, where only two parties are involved, it is as correct to state the rule in terms of the defendant's negligence as it is in terms of the plaintiff's. As a matter of fact, the Court made very clear, in a passage not quoted by petitioner, the purpose and effect of the rule:

> (U. S. p. 122) ". . . the purpose (is) to abrogate the common law rule *completely exonerating* the carrier from liability in such a case, and to substitute a new rule, *confining exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee.*" (Emphases added.)

By the very terms of the Act rights and liabilities are restricted to the employer-employee relationship. This being so, it is evident that Congress could not have contemplated any loss-distribution scheme beyond that relationship, nor can this Court, in the *Norfolk* case, *supra*, be thought to have spoken beyond the necessary confines of the Act. If the Act were concerned with loss distribution among *all* parties at fault, it would have so provided.[25] But there is not a single word in the Act which would give the

25. Assuming, of course, the Constitutional power to do so. It is at the least extremely doubtful that Congress had the power to extend the plan of loss distribution to persons not connected with interstate carriage, as, for example, to create a right of contribution between an interstate carrier and a jointly negligent local transit company.

slightest substance to this thought. Nor is there a shadow of suggestion in the Act that the concurring negligence of the carrier and a third party has any effect upon the injured employee's rights, or that it alters in the slightest degree the operation of the comparative negligence rule as meticulously defined therein. Congress evidently left the determination of third party rights and liabilities to the States, and was content to formulate the comparative negligence rule unhindered by the consideration of that problem, and without reference to it. If, as petitioner contends, comparative negligence is by concept and definition an all inclusive loss-distribution scheme, what is to be said for the Act of Congress which blithely ignores it?

In addition to the general maritime law, the Federal Employers' Liability Act, and the Jones Act (which incorporates the F. E. L. A. into the maritime law) at least twenty-six states have adopted some form of comparative negligence rule.[26] Out of the mass of litigation produced in these twenty-nine jurisdictions, petitioner has been unable to come forth with a single case which even discusses, much less supports, the petitioner's unique ideas concerning the essential nature of the comparative negligence rule. This overwhelming weight of complete silence is perhaps the most eloquent testimonial to the complete baselessness of petitioner's position.

It is clear, therefore, that the problem of loss distribution as between Hawn and Pope & Talbot is neither limited by, nor entangled with, rights and liabilities as between the latter and Haenn. Petitioner attempts to interweave the two only because without this asserted connection it cannot

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26. We rely for this figure entirely on the material contained in A Study of Comparative Negligence, Mole and Wilson, 17 Cornell Law Quarterly, 604, 608-609 (1932). Since the proposition here discussed was advanced by the petitioner for the first time in its Brief filed three weeks before argument, limitations of time foreclosed any extensive independent survey.

take advantage of its basic contention that under the principle of the *Halcyon* decision, *supra*, this Court is foreclosed from applying any rule other than the common law contributory negligence rule. We will advert to this in greater detail later. In substance and effect the moving force behind petitioner's attempt to formulate, out of thin air, its completely baseless view of the comparative negligence rule is the complaint, repeated over and over again, that although Haenn was also at fault, the *Halcyon* decision leaves petitioner without recourse against Haenn by way of contribution. Passing by the fact that the same counsel who now complain of the *Halcyon* result were responsible in *Halcyon* for urging upon this Court that no right of contribution exists in a case such as this, for present purposes it is important to recognize that petitioner's entire line of argument is bound to a number of basic fallacies, and that the net result of the position here taken reduces itself to a series of absurdities. We will briefly touch upon the more glaring examples:

(a) Presumably under petitioner's position, had the present litigation involved Hawn and Pope & Talbot only, Hawn's contributory negligence could not have barred recovery, since petitioner does not go so far as to challenge this Court's decision in *The Max Morris, supra,* 137 U. S. 1. But simply because Haenn also happened to have been concurrently negligent, this Court is urged not merely to abandon the comparative negligence rule, but to ignore *The Max Morris,* as well, thus relegating Hawn to the common-law contributory negligence rule.

(b) It is only because of the double accident of (1) diversity citizenship as between Pope & Talbot and Haenn, and (2) the availability of Haenn for service of process in the Eastern District of Pennsylvania, that Pope & Talbot was able to join Haenn as a third party defendant in the present litigation. Were it not for this accident Haenn would be out of the case. Under petitioner's view the find-

ing of negligence on the part of Haenn concludes Hawn from recovering altogether, because joint tortfeasorship is thereby established between Pope & Talbot and Haenn, and under these circumstances, petitioner contends, contributory negligence is a bar. But there is respectable authority for the proposition that where the right over is indemnity rather than contribution, then the third party defendant must respond to the defendant [27] and, therefore, under petitioner's present view, the comparative negligence rule can be applied without anomaly.

In this circumstance, how could the issue of contribution versus indemnity have ever been judicially determined if Haenn happened not to have been a party litigant here? Certainly not in a litigation between Hawn and Pope & Talbot only, for Haenn would be vitally interested in the outcome of the issue. Certainly, also, not in a litigation between Pope & Talbot and Haenn only, for Hawn would likewise be vitally interested in the outcome. In brief, under petitioner's view, it is only by sheer accident that Hawn's rights can be adjudicated at all.

(c) Counsel for petitioner repeatedly urges the inequity of requiring Pope & Talbot to bear a loss which is partly attributable to Haenn. But this Court, in the *Halcyon* case, *supra,* was not "wholly convinced that (contribution) would best serve the ends of justice" (342 U. S. at 285). Is petitioner's counsel now seeking to overrule the *Halcyon* decision, which they were but recently instrumental in bringing into being? And would not the result be equally "inequitable" if perchance Hawn had not been negligent,

27. In *Crawford v. Pope & Talbot, Inc.* and *National Boiler Cleaning Company,* — F. 2nd — (C. A. 3, Appeal No. 10,820, decided September 3, 1953) the Court of Appeals held that there is a difference between contribution and indemnity and that the decision in Halcyon bars only the former. Hence, Pope & Talbot, the present petitioner, was there given the right to establish a claim for indemnity against National, the third party defendant.

in which event, petitioner seems satisfied, Pope and Talbot would bear the *entire* loss, though Haenn was partly responsible for producing it?

(d) In *Halcyon, supra,* this Court determined the question of contribution as between shipowner and third-party defendant without reference to the method of loss distribution applied as between the injured longshoreman and the defendant shipowner—there were no facts before this Court to indicate whether the longshoreman had himself been contributorily negligent since by agreement of all parties before trial, a judgment was rendered for the longshoreman and paid by Halcyon How could this Court have entertained the question of contribution if, as petitioner now contends (page 14 et seq. of its brief) the problem of recovery as between longshoreman and shipowner is inextricably bound to the problem of recovery as between shipowner and third-party defendant, and cannot be adequately treated piecemeal?

(e) Under Section 33 of the Longshoremen's and Harborworkers' Act, Title 33 U. S. C. Sec. 933, Congress expressly reserved to the injured longshore worker the right to proceed, against persons other than the employer, for the recovery of damages. Petitioner observes that in reserving third-party actions Congress did not specify the method by which damages were to be ascertained, "nor did it see fit to abolish any of the common-law defenses which the third party might raise" (Petitioner's Brief, p. 15), from which it implies that Congress intended the common law rule of contributory negligence to apply to the case at bar. But Congress, evidently recognized what petitioner chooses to ignore, namely, that there was an established body of *maritime law* governing third-party rights and the method by which damages were to be ascertained. Furthermore, the assumption that contributory negligence was a common-law defense which Congress could have abolished if it would, is valid only if contributory negligence was a defense avail-

able in admiralty, which it assuredly is not. *The Max Morris, supra*, 137 U. S. 1. The query "why were the common law defenses not abolished?" makes sense only if there were common law defenses to be abolished.

(f) Petitioner points out (page 16 of its Brief) that Congress made the employer's fault unimportant in determining the employee's rights under the Harborworkers' Act. From this, it would be supposed, the petitioner should also recognize that Congress made the employer's fault equally unimportant *in determining the employee's third party rights specifically reserved under the Act, for nowhere are the employee's third party rights conditioned upon absence of fault on the part of his employer.* But that is not the conclusion which petitioner would draw. Rather, it is argued that since the employer's fault is unimportant, "the quantum of the employer's fault should (not) be made an ingredient in the formula of recovery." The obvious fallacy of this approach is that while Hawn's *injuries* were attributable, in part, to Haenn's fault, the *amount* of Hawn's recovery is in no sense dependent upon Haenn's fault. It is determined by the extent of Hawn's contributory negligence and nothing else.

(g) To highlight what it believes to be the clash between the rule applied in the Court below and the Congressional plan embodied in Harborworkers' Act, petitioner points out (pages 16-17 of its Brief) that had Pope & Talbot not been at fault in the present case Haenn would have been obliged to bear the entire loss imposed upon it by Congress under the Harborworkers' Act. "Yet," says petitioner "by the fortuitous circumstance that Pope & Talbot combined with Hawn and Haenn to produce Hawn's injuries, Haenn's entire burden is shifted to Pope & Talbot. Is it conceivable that the vagaries of a particular factual situation were intended to work such a drastic change in the obligations which Congress initially imposed upon the employer?" Here again, petitioner chooses to ignore that

part of the Congressional plan which is embodied in Section 33 of the Act (Title 33 U. S. C. Sec. 933). For in addition to reserving the third party rights of the employee, that Section provides that acceptance of compensation under an award *shall operate as an assignment, to the employer,* of the employee's third party rights; that the employer may institute proceedings against such third party for the recovery of damages sustained by the employee, *and that out of the amount so recovered the employer may retain all compensation and benefits paid and furnished under the Act as well as the expenses incurred in such proceedings plus a reasonable attorney's fee. The employer's rights, under this section of the plan, are not conditioned upon his freedom from fault in any sense whatsoever.* In the light of these provisions, how can it be believed that any supposed shifting of the burden from Haenn to Pope & Talbot is in conflict with the Congressional plan?[28] In our opinion these considerations demonstrate as conclusively as the circumstances permit, that Haenn's fault vel non has no bearing whatever either upon Hawn's right and extent of recovery, or upon Pope & Talbot's liability for the entire loss (diminished, of course, by the extent of Hawn's negligence). In brief, Congress has already effectively rejected the substance of petitioner's contentions.

To recapitulate, petitioner's position is that the comparative negligence rule applied below does not accord with the true meaning of that concept since it does not involve an equitable tri-partite rule of loss distribution as between Hawn, Pope & Talbot, and Haenn; that no such equitable

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28. True, there was no assignment in the case at bar because the compensation paid was not under an award. But petitioner's argument does not proceed on the basis of any express provisions of the Act; it proceeds entirely on what is conceived to be the sense and intent of the overall plan, considered in the light of "basic notions in integration." It is on these same terms that our answering argument is here made.

loss distribution rule exists in the admiralty; and that in the absence of such a recognized rule this Court is not free, under its decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., supra,* 342 U. S. 282, to formulate any rule of comparative negligence, just as in *Halcyon* it declined to formulate an admiralty rule of contribution between joint tort feasors; and that consequently, the common law rule of contributory negligence must control the result. We have thus far reviewed the first phases of petitioner's argument, and have pointed out that the problem which petitioner attempts to pose for this Court is not, in fact, presented in the particular straight jacket which petitioner would place upon it, i. e., in terms of an *equitable tri-partite apportionment,* for the simple reason that the comparative negligence rule is *not* a rule of apportionment which necessarily encompasses within its scope all of the parties at fault. What then, is the effect of the *Halcyon* decision upon the ultimate disposition of the case at bar?

In *Halcyon, supra,* this Court held, in substance, that although there is no recognized admiralty rule of contribution between joint tort feasors in non-collision cases, this Court, exercising jurisdiction in maritime affairs, would nevertheless feel free to fashion such rules, if wholly convinced that it would best serve the interests of justice; it concluded however, that it would be less wise to fashion new judicial rules of contribution, than to await Congressional action, in view of the fact that this problem must be integrated with other federal acts such as the Jones Act, The Harborworkers' Act, the Public Vessels Act (46 U. S. C. 781-790), the Limitation of Liability Act (46 U. S. C. Sec. 181 et seq.) and the Harter Act (46 U. S. C. Sec. 190-195), under all of which problems of contribution may arise, and in further view of the fact that many groups of persons with divergent views and interests are vitally concerned with the administration of these Acts as an integrated whole. Under these unique circumstances, this Court said:

(342 U. S. at 286) "We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run."

There is no comparable problem presently before this Court. First of all, whatever effect Hawn's negligence may have upon the *extent* of the damages recoverable, one thing is certain beyond peradventure of doubt, that under universally accepted maritime principles his contributory negligence *cannot bar recovery altogether: The Max Morris, supra; Beadle v. Spencer, supra; The Arizona v. Anelich, supra; Socony-Vacuum Oil Corp. v. Smith, supra.* Secondly, under the holding of this Court in *Halcyon, supra,* Pope & Talbot has no right of contribution as against Haenn. These two vital facts differentiate at the outset the problem involved in *Halcyon* from the problem here presented, for in *Halcyon* the central point from which the problem stemmed —the basic circumstance which gave rise to the problem in the first instance—*was the absence of an available maritime rule to control the result.* Not so here, for maritime rules are readily at hand defining the rights and liabilities of all of the parties.

Nor is there here any real problem of integration with existing Federal acts such as cannot be adequately resolved by the judicial process (were such integration at all necessary). Removing from consideration of the problem the phase relating to contribution (temporarily present only because petitioner has erroneously injected it) all that is actually involved is the effect of Hawn's contributory negligence upon *his* right to recover from Pope & Talbot. The only Federal Act to which this problem may be thought to have any real relation is the Harborworkers' Act which, under Section 33, *supra,* left the maritime rules governing rights and liabilities as between the longshoreman and persons other than the employer exactly where it found them.

This Court considered itself the appropriate tribunal for formulating the rule of divided damages in collision cases. *The Schooner Catherine v. Dickinson*, 58 U. S. 17, 15 L. Ed. 233. Again, in the *Max Morris, supra*, the effect of a longshoreman's contributory negligence was considered appropriate for judicial determination. The Congressional legislation since enacted has not changed these rules. This not only demonstrates that Congress is content to leave such maritime problems in the hands of the judiciary, but also establishes that these problems do not demand *Congressional* integration into existing Acts.

Finally, Congress *cannot* furnish the solution to the present problem. Because, *so long as Hawn's contributory negligence does not bar recovery* (whatever effect it might have on the extent of damages recoverable), *some rule of apportionment must be applied* even if it must now for the first time be formulated. This Court cannot await Congressional action before determining what formula to apply.

This Court, in *The Marianna Flora*, 24 U. S. 11, 6 L. Ed. 405, early observed (per Mr. Justice Story) that:

> "Even in cases of maritime torts independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law. They have exercised a conscientious discretion upon the subject."

After decades of evolution this basic philosophy finds its ultimate expression in this Court in the cases terminating in *Socony-Vacuum Oil Corp. v. Smith, supra.* We respectfully suggest that none of the considerations advanced by the petitioner foreclose the application of the comparative rule in the case at bar. On the contrary, every consideration calls for determining this case in harmony with the juristic field in which the rights and obligations of the parties originate.

SECOND QUESTION: HAWN'S JUDGMENT MAY NOT BE REDUCED BY THE AMOUNT OF PAYMENTS MADE TO HIM BY HIS EMPLOYER, HAENN.

Petitioner conceives the problem presented here as one of indemnity and poses the question substantially as follows: "Is Haenn entitled to indemnity from Pope & Talbot?" No such question is involved in this case.

The facts are that notwithstanding Hawn's election to recover damages against Pope & Talbot under Section 33 of the Harborworkers' Act,[29] Haenn, the employer, has continued to pay "compensation" at the rate of $25.00 per week. At the time judgment was entered below (September 28, 1951) Haenn had paid "compensation" in the sum of $4,040.00 and medical expenses in the sum of $831.35, or a total of $5,831.35. Since the entry of judgment Haenn has continued to make such payments to Hawn to the limit of its liability under the Act (although this fact is necessarily not of record). Hawn, in his turn, has agreed to repay to his employer all such sums, if and when his judgment against Pope & Talbot is collected.[30]

The simple question before this Cou t is whether there is any justification for striking down the agreement between Hawn and Haenn as being contrary to the provisions of the Harborworkers' Act. That it is not is made evident by an analysis of the provisions which bear on this point.

Under Section 933(a), *supra*, the employee may "elect . . . to receive such compensation or to recover damages against such third person." If the employee elects to pro-

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29. 33 U. S. C. Sec. 933:

"(a) If on account of disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect . . . to receive such compensation or to recover damages against such third person."

30. The facts appear in the Memorandum re Final Judgment—R. 202a.

ceed against a third person, Section 933(f) limits the employer's obligation under the Act to a sum equal to the difference between what the employer would have been required to pay under the Act and the amount recovered against such third person.[31] These two sections taken together make it clear that the employee, upon his election to sue, gives up his right to compensation *until the third-party action is finally adjudicated,* for it is then, and only then, that any determination of a possible excess over the amount recovered from the third party can be made. Thus, Haenn gave up valuable consideration for Hawn's agreement to repay—it continued the payments of "compensation" when there was no obligation to do so under the Act. Furthermore, since the limit of Haenn's obligation to pay compensation under the Act is $7500.00,[32] and the judgment rendered on behalf of Hawn is $29,700.00, there is in fact no excess of compensation payable under the Act over the amount recovered from the third party, so that under the circumstances here disclosed, Haenn was not and would not be at any time liable for the payment of any compensation whatsoever.[33]

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31. Section 933(f):

"If the person entitled to compensation—elects to recover against such third person,—the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person."

32. See Stipulation recited in the Memorandum re Final Judgment—R. 202a. This was in accordance with the provisions of the Act in force as of the time Hawn was injured—November 16, 1947 (R. 232). By Act of June 24, 1948 the limit was increased to $11,000.00 except in cases of permanent and total disability: Title 33 U. S. C. Sec. 914(m).

33. Unless, of course, Hawn's judgment is not sustained by this Court, in which event the entire question becomes moot.

Haenn gave up other valuable rights. First of all, it had the right to controvert its liability for compensation in the first instance, under Section 914(d). Secondly, had Haenn chosen to force an award and then to obtain assignment of Hawn's claim against Pope & Talbot under Section 933(b), it would have had the right, under Section 922, to seek a review and modification of the award. Thirdly, it would have had the right, under such an assignment, to retain out of the fund recovered from Pope & Talbot, all compensation payments made. 33 U. S. C. Sec. 933(b).

It is clear, therefore, that good and valuable consideration supports Hawn's agreement to repay Haenn, and that as a matter of fact if this agreement should be stricken down, as petitioner now urges, *Haenn would be deprived of recouping sums which it was under no obligation to pay except for this very agreement.* And the beneficiary of this wholly unsupportable scheme would be Pope & Talbot, who seeks to reduce Hawn's judgment by these sums, and thus make it impossible for Hawn to honor his agreement.

There is nothing in the Harborworkers' Act which would support such an inequitable result, or which intimates in the slightest that an agreement of this character is against the policy of the Act. As a matter of fact, the Act specifically covers the subject of invalid agreements, and extends its condemnation to just two types of situations. Neither comprehends the agreement presently under consideration.[34] In this situation, the silence of Congress, beyond those actually covered, is conclusive that no other agreements are outlawed by the Act.

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34. "*Sec. 915. Invalid Agreements.* (a) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid. . . .

"(b) No agreement by an employee to waive his rights to compensation under this chapter shall be valid."

Petitioner's contention (Brief, p. 50) that "the result sanctioned by the Court below is doubly inequitable and doubly offensive to *Halcyon*, for it permitted Haenn to secure not only contribution, but full indemnity from its partner in fault, Pope & Talbot" is therefore seen to be completely without foundation. There is neither contribution nor indemnity here involved. Petitioner's view is simply another aspect of the proposition it has advanced under the First Question, namely, that this case must be considered in the light of an overall loss distribution scheme. But it has even less bearing on the present question than before, for all that is really involved here is the repayment of a loan advanced by Haenn to Hawn. That Haenn should be foreclosed from recovering this loan, made under humanitarian circumstances, would be unconscionable.

THIRD QUESTION: WHETHER THE DOCTRINE OF SEAWORTHINESS APPLIES TO HAWN IS A MOOT QUESTION.

This case was tried to a jury, which returned a special verdict in favor of Hawn. The jury specifically found, in answers to interrogatories submitted to them, that (a) the S. S. "John Dickinson" was unseaworthy, and (b) that petitioner Pope & Talbot, Inc., was negligent (R. 180a). The Court of Appeals sustained both findings (R. 232-233, 234), and consequently the judgment below rests upon both *negligence* and unseaworthiness. But the petitioner does not here attack the finding of negligence; it presents no question for review relating to that issue. The judgment below must therefore stand even assuming (though, of course, in no sense conceding) that it is not supportable on the finding of unseaworthiness. In this context the issue of unseaworthiness falls completely out of the case as now presented to this Court and therefore, as we see it, has become moot.

Petitioner suggests, however, that whether the question of unseaworthiness is moot depends upon the answer to the first question presented. Its position is that if this Court should hold that Hawn's contributory negligence does not bar recovery, then the extent to which Pope & Talbot will be required to respond to Hawn will differ if its liability is predicated on negligence as opposed to unseaworthiness. This is an erroneous view. The amount of Hawn's recovery from Pope & Talbot is determined by the extent of *his* contributory negligence and nothing else, as we have fully covered under the First Question. The *basis* upon which liability is being imposed upon Pope & Talbot, whether negligence or unseaworthiness, has no bearing upon this question. Assuming, however, that this Court may not agree with our view, we will briefly consider the question.

In its Petition for Certiorari, Pope & Talbot presented the question as follows (Pp. 6-7 of the Petition):

> "3. Is the warranty of seaworthiness owing by a shipowner to employees of a stevedore under Seas Shipping Company v. Sieracki, 328 U. S. 85, likewise owing by a shipowner to an employee of a carpentry contractor engaged in alterations and repairs to a vessel's fittings."

Now, however, petitioner is no longer content with a review of the limited question presented. It seeks to overthrow the *Sieracki* doctrine altogether, and this for the sole reason that three of the Justices in that case had dissented, and that "the reasons given in the dissent are just as valid, and just as persuasive today as when first uttered" (Petitioner's Brief, p. 53). No other reason, and no other consideration, is advanced as a justification for overruling the *Sieracki* case. Under the circumstances we do not feel that we are called upon to here justify the *Sieracki* doctrine.

Proceeding to the question presented in the Petition, we submit that the *Sieracki* doctrine fully encompasses a longshore worker in Hawn's status, and for precisely the

same considerations applies equally to Hawn as it did to Sieracki. The *Sieracki* decision did not confine the application of the doctrine solely to those longshore workers who actually handle cargo. Its rationale was upon a much broader footing. Quite understandably, since Sieracki's employer was engaged to unload the vessel there involved, much of the Court's language is cast in terms of "longshoremen engaged in loading vessels." But this circumstance is not to be held as rigidly limiting the boundaries of the doctrine, when the entire rationale of the decision points the other way. As a matter of fact, Sieracki himself was nothing more nor less than a winch operator (U. S. p. 87).

This Court, in considering the historical background of the Harborworkers' Act in *Norton v. Warner Co.*, 321 U. S. 565, 569-570, 88 L. Ed. 931, 936, has pointed out the Congressional recognition of the fact that the class of employees commonly known as longshoremen are those who are "mainly employed in loading, unloading, *refitting* and repairing ships."

Hawn was a hatch foreman engaged by Haenn to make minor alterations to the grain feeders on the "John Dickinson". Actual loading of the vessel had commenced at the time, but was interrupted because the grain feeders first used for loading grain had to be changed to receive a cargo of oats. This meant merely that the corners of the feeders were to be cut out, the center shifting board which was "cribbed" was to be made solid, and wing shifting boards were to be erected (R. 232). There is no doubt that historically, and before the advent of modern specialization, this minor carpentry work was performed by the ship's carpenter with the assistance of the crew. The ship's carpenter is traditionally a member of the complement of the vessel. He has many times played a part in the reported decisions. See, for example, the facts in *Atlantic Transport Co. v. Imbrovek, supra*, 234 U. S. 52 (1913).

Hawn was engaged in preparing the vessel for the imminent receipt of cargo requiring special provision for

loading. In a very real sense he was engaged in the operation of loading the vessel, which had only temporarily been interrupted at the time he was injured. We do not believe that the *Sieracki* doctrine would not have been applicable to the winchman there involved if, instead of actually operating the winch at the time he was injured, he had been engaged in making adjustments to the winch to properly handle cargo about to be brought aboard, or had been engaged in changing the falls to accommodate heavier cargo, or had been covering or uncovering the hatches, or had been performing any one of a number of tasks now regularly performed by longshoremen, but formerly traditionally performed by the crew. Nor do we think that any sensible distinction can be made between Hawn and the longshoremen who, just shortly before the accident, were guiding the grain spout at the top of the feeder. Had Hawn and these longshoremen been engaged as fellow workmen by the same company, could it rationally have been contended that Hawn was any less intimately connected with the loading of cargo, or the service in which the ship was then engaged, than the men who were guiding the spout?

In *Sieracki, supra,* this Court said:

> (U. S. p. 95) "All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through

another with whom he arranges to have it done. The latter ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them. If not, no such obligation exists unless it rests upon the owner of the ship."

We respectfully submit that the full force of this language, and all of the considerations which persuaded this Court in formulating the doctrine for the benefit of those encompassed within the scope of the *Sieracki* decision, are applicable with equal force to a longshoreman occupying the status of Hawn. Any supposed difference between a maritime worker who actually puts cargo aboard the vessel, and a maritime worker, such as Hawn, who either stores the cargo after its receipt on board, or prepares the vessel while in port for its imminent receipt and proper storage during the actual loading operations, is too tenuous a distinction upon which to hinge the formulation of a maritime rule of liability.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1953.

No. 13.

POPE & TALBOT, INC.,

Petitioner,

v.

CHARLES HAWN

and

HAENN SHIP CEILING AND REFITTING CORPORATION.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT, HAENN SHIP CEILING AND REFITTING CORPORATION.

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BRIEF FOR RESPONDENT, HAENN SHIP CEILING AND REFITTING CORPORATION.

OPINIONS BELOW.

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed July 17, 1951 (R. 192a)* is reported at 99 F. Supp. 226. Judge McGranery's supplemental opinion, embodying the entry of judgment filed September 28, 1951 (R. 202a) is reported at 100 F. Supp. 338. The opinion of Circuit Judge

* Numbers within parentheses refer to pages in the printed record.

McLaughlin of the United States Court of Appeals for the Third Circuit, filed August 27, 1952 (R. 231) as amended September 4, 1952 (R. 246) and November 3, 1952 (R. 272) is reported at 198 F. 2d 800.

JURISDICTION.

The jurisdiction of this Court to review the final judgments of the United States Court of Appeals for the Third Circuit is provided by § 1254(1) and § 2101(c) of Title 28, U. S. Code.

STATEMENT OF THE CASE.

The petitioner's statement of the case adequately presents the facts.

ARGUMENT.

The respondent, Haenn Ship Ceiling and Refitting Corporation (which will hereafter be referred to as "Haenn"), is not legally concerned with the petitioner's argument relating to the effect of the contributory negligence of Hawn on his right of recovery.

The petitioner does not attack the decision of the Court of Appeals reversing the judgment in favor of the petitioner against the respondent Haenn (R. 273, 274).

The petitioner does not ask any affirmative relief or order by your Honorable Court in its favor against the respondent Haenn.

We submit therefore that the Petition for Certiorari as to the respondent Haenn was improvidently granted and should be dismissed.

The respondent Haenn is indirectly concerned with the second question raised by the petitioner, i. e., "Whether Haenn is entitled, in effect, to indemnify itself at Pope & Talbot's expense" (Petitioner's Brief, p. 47), and this brief will be limited to that question.

The Petitioner Is Not Entitled to Have the Judgment of Hawn Reduced by the Amount of Compensation and Medical Expenses Which Hawn Has Agreed to Pay the Respondent Haenn.

The petitioner is asking this Court to reduce Hawn's judgment against it by the amount of compensation payments and medical expense which Hawn has agreed to repay to Haenn. If Hawn carries out his agreement, Haenn, his employer, will suffer no loss, although he has been negligent in causing the injury. The petitioner contends that by reason of Haenn's negligence it should be deprived of its right of subrogation under the Longshoremen's & Harbor Workers' Act and of the benefit of the contract it made with Hawn to repay the amounts paid him as compensation and to reimburse it for medical expense.

If Hawn's judgment against the petitioner is reduced, the effect of this will be that the petitioner will obtain a partial contribution from its joint tortfeasor contrary to the decision of this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation*, 342 U. S. 282.

The Court of Appeals on the authority of *Halcyon* held that the petitioner was not entitled to obtain contribution in this manner.

In this case, after Hawn's injury, his employer, respondent Haenn, paid compensation to him under the Harbor Workers' Act and, notwithstanding Hawn's election to sue the petitioner, it has continued to pay compensation upon an agreement that if and when judgment was collected against the petitioner, Hawn would repay all compensation payments and moneys expended for his treatment (R. 202).

Under Section 33 of the Act, Hawn had the right to elect to receive compensation or to recover damages against a third person (33 U. S. C. Sec. 933(a)). That section provides as follows:

> "(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person."

In this case, Hawn received payments of compensation and later elected to sue the petitioner, as he clearly had a right to do, *American Stevedores v. Porello*, 330 U. S. 446, 455-456.

If the employee elects to proceed against a third person the employer's obligation under the Act is limited to a sum equal to the difference between what the employer is obligated to pay under the Act and the amount recovered from the third person, as provided in Section 33(f) of the Act (33 U. S. C. 933(f)), as follows:

> "(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Secretary of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person."

In view of these provisions, the respondent Haenn, upon the election of Hawn to sue, was legally justified in discontinuing compensation payments, pending the eventual outcome of the suit against the petitioner. In agreeing to continue compensation payments, Haenn undertook an obligation which it was not bound under the law to perform and Hawn received the benefit of weekly payments, which

he could not legally demand. This was a valid and binding agreement and is of no legal concern to the petitioner.

There is no merit in the petitioner's contention that if Hawn recovers his judgment in full he would be obtaining a double recovery by reason of having received compensation from his employer (Petitioner's Brief, p. 47). This is not true because by his agreement Hawn is obligated to repay to Haenn the moneys which he has received. If there had been no such agreement Hawn would have received from his employer a much smaller sum. If Haenn had made no payments of compensation, it certainly could not be contended that Hawn's judgment should be reduced and there would be no basis for the petitioner to so contend. The petitioner's demand that Hawn's judgment be reduced is therefore based solely upon the fortuitous existence of the contract to repay, which the parties were free to make and is supported by ample consideration.

It is argued that if Hawn carries out his agreement to repay Haenn, the entire burden of the damages is shifted to the petitioner and that it is paying not only for its own fault but for that of the respondent Haenn. This contention is not sound for the reason that the judgment of Hawn against the petitioner represents compensatory damages for injuries caused by its own negligence under proper instructions by the Court as to the elements of damage which were to be comprehended by the verdict (R. 156). Actually the damages were computed without consideration of any obligation on the part of the respondent Haenn to make any payments under the Act. Under the instructions of the Court the damages would have been the same even though the respondent Haenn were not a party to the action. The damages also were fixed without any consideration of Hawn's agreement to repay the moneys he had received. The situation is much the same as if Hawn had assigned to any third person a part of his judgment.

There is no shifting of part of the burden of the judgment from the respondent Haenn to the petitioner. The

petitioner is paying only the price of its negligence as determined by the jury. It is clear under the *Halcyon* case that had the respondent Haenn been a joint tortfeasor and a person other than Hawn's employer, the petitioner could not claim contribution from his joint tortfeasor. The mere fact that the joint tortfeasor is the employer of the injured party, and subject to the provisions of the Harbor Workers' Act, should not operate legally to create a right of contribution in favor of the petitioner, which it otherwise does not have.

We submit that the existence of the Harbor Workers' Act and the fact that its provisions are binding upon respondent Haenn do not create any rights or benefits in favor of the petitioner.

The Act confers upon an injured employee a right to compensation regardless of negligence or fault on the part of his employer (33 U. S. C. Sec. 904).

Section 905 provides, in material part, as follows:

> "The liability of an employer described in Section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *." (33 U. S. C. 905.)

It is clear that under Section 33 of the Act, subdivisions (b), (c), (d) and (e), where an employer pays under an award the employee's cause of action against a third party is assigned to the employer, who alone is entitled to prosecute the action and out of any recovery the employer is entitled to retain expenses and attorney's fees in the suit, the cost of benefits furnished to the employee and amounts paid as compensation. The balance is to be held in trust for the payment of all future compensation to become due and any excess is payable to the employee (33 U. S. C. 933 (b), (c), (d), (e)).

Although the Act does not in terms provide for subrogation where compensation payments and expenses are made by the employer in the absence of a formal award, it has been held that the employer is entitled to subrogation out of his employee's recovery against a third party. *The Etna*, 138 F. 2d 37.

In that case the Court said that the purpose of the Act is to secure prompt and periodic payments of compensation without an award as required by Section 14(a) of the Act (33 U. S. C. 914(a)), and it was held that the voluntary payment without an award did not deprive the employer of his right to reimbursement out of the judgment recovered against a third party.

The obligation of the employer to pay is without regard to his negligence and the law has imposed upon him this duty in exchange for an immunity from suits for damages by all of his employees.

In *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, supra*, this Court said:

> "Congress has already enacted much legislation in the area of maritime personal injuries. For example, under the Harbor Workers' Act, Congress has made fault unimportant in determining the employer's responsibility to his employee; Congress has made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk and by the creation of a statutory schedule of compensation." (pp. 285, 286.)

Section 33 of the Act, which has been amended since its original enactment, shows that Congress has given particular attention to the right of subrogation of the employer who has paid under an award (33 U. S. C. 933). It provides for the disposition of the moneys recovered by the employer and defines his position with his employee where the recovery is more or less than the employee would be

entitled to receive as compensation. The subdivisions of this section of the Act, comprehend all of the various contingencies which may arise, thus indicating that the rights of both the employer and the employee were given full consideration by Congress.

The Act does not provide that the employer's right to proceed against a third party is conditioned upon his being free from fault or negligence in causing the injury. In such a proceeding he is enforcing the right of his injured employee. When he seeks reimbursement by way of subrogation pro tanto in a judgment obtained by his employee against a third party he stands in no different position. He is getting back only the payments which the law has compelled him to make without regard to any fault on his part.

To construe the Act so as to deny subrogation to an employer because he was contributorily negligent in bringing about the injury to his employee, would be writing into the Act a provision which Congress, in specific terms, did not include. Congress has legislated extensively in the field of maritime personal injuries, as was pointed out by this Court in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation, supra* (pp. 285, 286), and this Court expressed the view that the question of contribution, whether based on equal division of damages or relatively apportioned in accordance with the degree of fault of the parties, should be left to Congress. So in this case there is no justification for so interpreting the Act to deny subrogation to the employer, especially when the actual effect thereof is to enable a negligent third party to obtain from an employer who has paid compensation without regard to his negligence a partial contribution or reduction in the damages which the third party has been obliged to pay by reason of his own negligence.

The petitioner's contention that the respondent Haenn should be deprived of its right of subrogation because of its

negligence is the precise question which was considered by the Court of Appeals for the Third Circuit when it decided the *Halcyon case* (*sub nom. Baccile v. Halcyon Lines*, 187 F. 2d 403). The Court of Appeals held that the employer subject to the terms of the Act was required to make "contribution to the extent of the compensation he would have had to pay to the employee, had the employee not elected to sue the third party" (p. 406). That decision of the Court of Appeals was reversed by this Court in the *Halcyon Case, supra*. The petitioner's contention, therefore, has been already rejected by this Court.

CONCLUSION.

It is respectfully submitted that the petitioner is not entitled to have the judgment against it reduced because of the negligence of the respondent Haenn, and that the concurring negligence of Haenn does not affect its right to be subrogated in part to Hawn's judgment or to have the benefit of its contract with Hawn. The petition as to this respondent should therefore be dismissed.

Respectfully submitted,

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